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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit complied with this Court's instruction to reconsider its original decision in this case in light of *Montana v. United States*, 450 U.S. 544 (1981).

2. Whether the Mescalero Apache Tribe has "inherent authority" over wildlife within the Mescalero Apache Reservation which preempts the application of state game and fish laws to non-Indians hunting or fishing within the Reservation.

3. Whether the authority of the State of New Mexico to impose its game and fish laws on non-Indians hunting and fishing on the Mescalero Apache Reservation has been preempted by federal legislation or treaty stipulation.

4. Whether the application of state game and fish laws to non-Indians hunting and fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe "to make its own laws and be governed by them" contrary to *Williams v. Lee*, 358 U.S. 217 (1959).

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MESCALERO APACHE TRIBE,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The State of New Mexico and Harold F. Olson, individually and as Director of the New Mexico Department of Game and Fish, respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 26, 1982, on remand from the Supreme Court of the United States. This Court previously granted the petition for writ of certiorari filed in this case by these petitioners, vacated the former decision of the United States Court of Appeals for the Tenth Circuit and remanded this proceeding to that court for further consideration in light of the decision of this Court in *Montana v. United States*, 450 U.S. 544 (1981). 450 U.S. 1036 (1981). The decision of the Tenth Circuit following remand is the subject of this petition.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit on remand from the Supreme Court of the United States is reported at 677 F.2d 55 (1982) and appears in the Appendix at 2a. The former opinion of the United States Court of Appeals of the Tenth Circuit, which was previously vacated by this Court, is reported at 630 F.2d 724 (1978) and appears in the Appendix at 8a. The judgment entered in this case by the United States District Court for the District of New Mexico on August 2, 1978, which appears in the Appendix at 35a, is unreported. The memorandum opinion of the District Court of August 2, 1978, which appears in the Appendix at 37a, is also unreported.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on remand from the Supreme Court of the United States, was filed on April 26, 1982 (Appendix at 2a). On June 25, 1982, Mr. Justice White extended the time within which to file a petition for writ of certiorari to and including August 25, 1982 (Appendix at 1a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Material portions of pertinent treaty and statutory provisions are included in the Appendix at 54a *et seq.*

STATEMENT OF THE CASE

A. The Factual Background.

In July 1975, the Mescalero Apache Tribe opened the Inn of the Mountain Gods located on the Mescalero Apache Indian Reservation in south central New Mexico.

The Inn of the Mountain Gods is a deluxe, tourist resort featuring a luxury hotel, a stocked lake for fishing, boating, and water sports, a golf course, pro shop, tennis facilities, swimming pool, trap and skeet shooting range, a stable complex, paddle tennis courts, restaurants, liquor lounges, and convention facilities (R. Vol. I, p. 120).[1] The Inn is operated by the Mescalero Apache Tribe as part of a tourism program established by the Tribe to attract non-Indians to the Reservation as well as to the Sierra Blanca Ski Resort, a tribal commercial enterprise located adjacent to the Reservation. In connection with the operation of the Inn of the Mountain Gods, the Mescalero Apache Tribe also maintains a hunting and fishing business, including "package" hunts of big game animals, and a camping and picnicking program. "Package" hunts of big game animals include hunting fees, lodging at the Inn, guide service, and various other hunter needs (R. Vol. I, pp. 121-122). The Inn of the Mountain Gods, as well as the Tribe's hunting and fishing business, caters almost exclusively to non-Indian patrons from across the country. At least 97 percent of the guests at the Inn of the Mountain Gods, including hunters and anglers, are non-Indians from off the reservation (R. Vol. I, pp. 121-122). Public highways and other State public facilities and services are used by persons hunting and fishing on the Mescalero Apache Reservation (R. Vol. I, p. 136).

In 1977 the Mescalero Apache Tribe adopted a general hunting and fishing ordinance which states it is applicable to all persons, Indian and non-Indian, who hunt or fish on the Reservation. The ordinance requires non-Indians to purchase a tribal permit, and it establishes seasons and bag limits. The ordinance also declares that "no state license of any kind shall be necessary for any person" with respect to hunting or fishing on the Mescalero Apache Reservation (R. Vol. I, p. 122).[2]

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[1] "R. Vol." refers to a particular volume of the record filed in the Tenth Circuit.

[2] Prior to 1977 the tribe's hunting brochures stated that all New Mexico hunting regulations apply on the Reservation (R. Vol. I, p. 125).

Both federal and state agencies have assisted the Tribe's hunting and fishing business. In 1966 and 1967 the National Park Service donated 162 elk to the Tribe. These were shipped into New Mexico pursuant to a permit issued by the New Mexico Game and Fish Department which had encouraged the project (R. Vol. I, p. 124). A Bureau of Indian Affairs range conservationist makes aerial surveys and pellet group transect studies to estimate deer, elk, antelope and bear populations, and he recommends seasons and bag limits for these species to the Tribal Council (R. Vol. I, pp. 122, 123). The U.S. Fish and Wildife Service provides technical assistance respecting management of fish, and the Service stocks reservation streams and several man-made lakes built with federal funds (R. Vol. I, p. 123).

The New Mexico Department of Game and Fish has in the past stocked streams on the Reservation and has supplied other assistance including the training of conservation officers at the request of the Tribe (R. Vol. I, pp. 123, 124-124). The elk, deer and bear populations in south central New Mexico range freely on and off the Mescalero Apache Reservation throughout the year (R. Vol. I, p. 124). Moreover, the State has maintained wildlife conservation programs of long standing in areas surrounding the Reservation (R. Vol. I, pp. 124-128), and State officers enforced wildlife laws and regulations on the Reservation against nontribal members until 1969 when the Tribe informed the State that its fish and game officers would no longer be welcome on the Reservation without tribal permission (R. Vol. I, pp. 130, 131). Thus, the assertion by the Court of Appeals that the State is unable to claim that it or its lands played any significant role in the creation and preservation of the reservation wildlife resource is contradicted by the record.

From at least 1971 through the period of this litigation, virtually all of the big game permits authorized by the Mescalero Apache Tribe have been sold (R. Vol. I, pp. 138-139). The non-Indian demand for big game and package hunts has each year exceeded the number of

permits available (R. Vol. I, p. 135). Revenues from the tribal hunting and fishing program as well as from the operation of the Inn of the Mountain Gods have increased annually over the last several years (R. Vol. I, pp. 135-136).

B. Proceedings in the Courts Below.

On July 7, 1977, the Mescalero Apache Tribe filed an action for declaratory and injunctive relief alleging, *inter alia*, that enforcement of the hunting and fishing laws of the State of New Mexico against hunters and anglers on the Mescalero Apache Reservation, either while they are on the reservation or after they have departed from the reservation, infringes on tribal sovereignty, conflicts with the Treaty of July 1, 1852, between the United States and the Apaches, 10 Stat. 979, and with certain other specific federal constitutional and statutory provisions. The complaint urged the District Court to declare that jurisdiction to regulate hunting and fishing on the reservation is vested in the Tribe and the United States to the complete exclusion of the State of New Mexico.

The District Court determined that the Mescalero Apache Tribe has an inherent right to control hunting and fishing within tribal territory, a right which had been neither abrogated nor surrendered. The District Court found that this right to control rested exclusively with the United States and the Mescalero Apache Tribe because, although Congress could relinquish this authority to the several states, the Court found no federal legislation conferring upon the State of New Mexico authority to regulate on the Mescalero Apache Reservation. The District Court also concluded that the federally-approved game and fish ordinances of the Mescalero Apache Tribe and its federally-supported game and fish program on the Reservation constituted an "integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation." Appendix at 52a. The District Court enjoined the State of New Mexico from enforcing its hunting and fishing laws "against any

person either on the reservation or after they [sic] have left the reservation for acts done in the reservation." Appendix at 36a.

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, holding that the Mescalero Apache Tribe had "inherent authority" over wildlife within the Reservation that preempted the application of state game and fish laws to any person within its tribal territory; that the application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation had been preempted by federal legislation and treaty stipulation; and that application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation infringed on tribal self-government.

The State of New Mexico filed a petition for writ of certiorari in the Supreme Court of the United States on November 12, 1980, seeking review of the Tenth Circuit's decision. On April 6, 1981, this Court granted the petition, vacated the judgment of the Tenth Circuit, remanded the case to that Court for further consideration in light of this Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), and awarded costs against the Mescalero Apache Tribe.

On remand, the Tenth Circuit accepted supplemental briefs from the parties, and, on April 26, 1982, entered a decision which reinstated its original opinion and reiterated its conclusion that any state authority over non-Indian hunting and fishing on the Mescalero Apache Reservation would conflict with the Tribe's "broad power" to control "tribal resources" within the reservation, and thus would infringe on the tribe's inherent sovereignty.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Tenth Circuit on Remand Ignores This Court's Instruction to Reconsider the Case in Light of *Montana v. United States.*

On April 6, 1981, this Court granted the petition for a writ of certiorari, vacated the decision of the Tenth Circuit and remanded the case ". . . for further consideration in light of *Montana v. United States*, 450 U.S. 544 (1981)." 450 U.S. 1036 (1981).

On remand, contrary to this Court's instruction, the Tenth Circuit simply reinstated its previous decision and dismissed this Court's opinion in *Montana v. United States* as irrelevant to the resolution of this case. The Tenth Circuit sought to distinguish this case from the *Montana* case by making the superficial observation that *Montana* dealt with the power of an Indian tribe "to regulate fishing and hunting by non-Indians on lands within its reservation *owned in fee simple by non-Indians*," while this case involves the power of a state to regulate non-Indian hunting and fishing on reservation trust lands. Appendix at 6a.

The Tenth Circuit thus failed to recognize and apply the underlying principles enunciated in *Montana*. In addition, the court below failed to address the fact that the Ninth Circuit's holding that the State of Montana has concurrent authority with the Crow Tribe to regulate nonmembers hunting and fishing on the reservation, a holding squarely on point with this case, was not contested on appeal and was left standing by this Court. The Tenth Circuit thereby totally ignored this Court's clear instruction on remand.

In *Montana v. United States*, this Court considered issues regarding the limits of Indian tribes' inherent sovereignty. The Court stated that Indian tribes retain the inherent power over relations among members of a tribe but that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control

internal relations is inconsistent with the dependent status of the tribes" and cannot survive absent an express congressional delegation. 450 U.S. at 564. See *United States v. Wheeler*, 435 U.S. 313 (1978).

Hence, in discussing its decision in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), this Court in *Montana* declared that

> ...The principles on which... [Oliphant] relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the Tribe.

Montana v. United States, 450 U.S. at 565. This "general proposition" is applicable without exception to all lands within an Indian reservation, including both non-Indian fee lands and Indian trust lands. See *Oliphant v. Suquamish Indian Tribe*. Thus, contrary to the Tenth Circuit's superficial observation, the factual difference between the *Montana* case and this case is completely inconsequential.

The original decision of the Tenth Circuit failed to apply this "general proposition" to the instant case and thus occasioned its remand. Indeed, the Court below actually inverted this general principle and began its analysis with the presumption of exclusive tribal sovereignty: "The sovereign powers of the tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage." Appendix at 16a. In so doing, the Court below, in contrast to the *Montana* decision, declared exclusive inherent tribal sovereignty over nontribal members within the reservation to be the rule rather than the exception.

To be sure, this Court in *Montana* recognized that there are some instances in which Indian tribes retain inherent sovereign authority to regulate the activities of nonmembers on the reservations, specifically, activities of nonmembers who enter consensual relationships with a tribe or its members through commercial dealings, and

conduct by a nonmember that threatens or has some direct effect on the political integrity, economic security or health and welfare of the tribe. However, even in those instances when a tribe is found to have inherent authority to regulate nonmember activity, the court did not suggest that such authority is exclusive. In this case, the Tenth Circuit left no room for an examination of whether tribal authority extends to non-Indian hunting and fishing on the Mescalero Apache reservation and, if so, whether it is exclusive of state regulatory authority.

Instead of applying the principles articulated by the Court in *Montana* to this case on remand, the Tenth Circuit elected to reconsider its decision in light of *Merrion v. Jicarilla Apache Tribe*, ____ U.S. ____, 71 L.Ed.2d 21 (1982), stating that, "in contrast to *Montana v. United States*, but like *Merrion v. Jicarilla*," the present proceeding "deals with the broad power of the Tribe to control, exploit and regulate tribal resources on tribal lands." Appendix at 6a.

Contrary to the Tenth Circuit's opinion, it is the *Merrion* case, not the *Montana* decision, that is irrelevant to the resolution of this case. The *Merrion* case did not involve the question of State authority to tax or regulate non-Indian activity within an Indian reservation. Instead, *Merrion* involved only the question of tribal authority to impose a severance tax on oil and gas removed from the Jicarilla Apache Reservation. The implications, if any, that such tribal taxing authority may have with respect to concurrent State taxing or regulatory authority was not discussed, much less resolved, in the *Merrion* decision.[3] Moreover, contrary to the Tenth Circuit's view, the instant case does not deal with "the broad power of the tribe to control, exploit and regulate tribal resources on tribal

[3] Indeed, this Court expressly acknowledged that the authority of the State of New Mexico to tax non-Indian oil and gas production within the Jicarilla Apache Reservation was not considered in any respect in the *Merrion* case. *Merrion v. Jicarilla Apache Tribe*, ____ U.S. ____, 71 L.Ed. 2d 21, 38 n.17.

lands." There simply is no dispute in this case concerning the authority of the Mescalero Apache Tribe ". . . to control, exploit and regulate" the taking of fish and game on Indian trust lands within the Mescalero Apache Reservation by either members or nonmembers of the Tribe. The issue presented is whether the State of New Mexico's concurrent authority over nonmembers has been preempted by federal law or whether state regulation would interfere with the regulatory efforts of the Tribe. Those issues were addressed by this Court in *Montana*, not in *Merrion*. The Tenth Circuit has simply ignored the instructions of this Court to reconsider this case in light of *Montana v. United States*.

II. The Decisions of the Court Below Conflict with Decisions of the Eighth and Ninth Circuits and with Rulings of Other Courts on a Recurring Issue of Importance to Many States.

The decision of the Tenth Circuit on remand reinstated its previous holding that New Mexico conservation laws relating to the taking of wildlife by nontribal members on the Mescalero Apache Reservation are preempted by federal law and also unlawfully infringe upon the right of reservation Indians "to make their own laws and be ruled by them." This holding of the Tenth Circuit is in square conflict on both the federal preemption question and the *Williams v. Lee* infringement question with the recent holding of the Eighth Circuit in *White Earth Band of Chippewa Indians v. Alexander*, No. 81-1805 (filed May 14, 1982) and with the decisions of the Ninth Circuit in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (1981) and *United States v. State of Montana*, 604 F.2d 1162 (1979), reversed on other grounds, *Montana v. United States*, 450 U.S. 544 (1981).

In addition to the above-mentioned cases, state authority to regulate hunting and fishing by nontribal members on an Indian reservation has been upheld in a number of other cases. *United States v. Sanford*, 547 F.2d

1085 (9th Cir. 1976); *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969 (S.D. Ca. 1977), *reversed on other grounds*, 595 F.2d 1153 (9th Cir. 1979); *State of Montana ex rel. Nepstad v. Danielson*, 149 Mo. 438, 427 P.2d 689 (1967); and *Ex Parte Crosby*, 38 Nev. 389, 149 P.989 (1915).[1] Contra, *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 446 U.S. 960 (1980).

In addition, in direct contrast to the rulings of the Tenth Circuit in the instant case, such federal enactments as the Indian Reorganization Act, 25 U.S.C. § 476, Public Law 280, 18 U.S.C. § 1162(b), and the Federal Trespass Law, 18 U.S.C. § 1164, have been held not to be preemptive of state wildlife conservation laws insofar as such laws apply to nontribal members. *E.g., White Mountain Apache Tribe v. Arizona*, 649 F.2d at 1279-1281.

Petitioner submits that the question of applicability of state wildlife conservation laws to nontribal members is indeed an important question of state-tribal jurisdiction, that it is a recurring question, and that a square conflict exists between holdings in the Tenth Circuit on the one hand and holdings in the Eighth and Ninth Circuits and other courts.

III. The Tenth Circuit's Finding of Preemption and Infringement on Tribal Self-Government Would Effectively Oust State Power Over Numerous Non-Indian Activities on Reservations and Would Significantly Expand the Exclusionary Effect of *Williams v. Lee*.

The Tenth Circuit's original opinion, now reinstated, while asserting that the applicability of state regulation within a reservation depends upon whether the subject

[1] The Solicitor of the Department of the Interior in 1971 issued a formal opinion advising that nontribal members are subject to state game laws on an Indian reservation. 78 I.D. 101 (1971). During 1976 the Solicitor's Opinion was withdrawn without explanation.

matter has been preempted by federal law or whether state regulation infringes on tribal self-government, the test reaffirmed in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), actually proceeds on an entirely different course. Appendix at 15a-16a. Instead of applying the proper two-prong test, the Tenth Circuit's analysis proceeds from the premise of tribal sovereignty. The Court invokes treaties and statutes as evidence of the tribe's inherent sovereignty, thus ignoring the call in *Bracker* to undertake a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." 448 U.S. at 145.

Petitioners submit that the Tenth Circuit's analysis in this case assumes what is to be proved and gives no weight whatsoever to the strong state interest in regulating its wildlife resource. In addition, the decision of the court below conflicts with decisions of this Court, other Circuit Court decisions and decisions of the Tenth Circuit itself in the specific findings of preemption and infringement on tribal self-government. If the court's analysis is allowed to stand, proceeding as it does from a presumption of tribal sovereignty, petitioners submit that state power over many non-Indian activities on reservations would be ousted, thereby significantly expanding the exclusionary effect of *Williams v. Lee*, 358 U.S. 217 (1959).

A. Federal Preemption.

In its reinstated opinion, the Tenth Circuit determined that application of state game laws to non-Indians hunting or fishing on the Mescalero Apache Reservation has been preempted by (1) the Treaty of July 1, 1852, between the United States and the Apaches, 10 Stat. 979; (2) the Enabling Act for New Mexico, 36 Stat. 557 (1910); (3) the Indian Reorganization Act of 1934, 25 U.S.C. § 476; (4) the tribal constitution and ordinances enacted pursuant to the Indian Reorganization Act; (5) federal developmental assistance; and (6) Public Law 280, 67 Stat.

588 (1953). Appendix at 21a-25a. For the reasons that follow, petitioners contend that state law has not been preempted by the relevant treaties or statutes.

(1) *Treaty of July 1, 1852.* By emphasizing particular words in Articles 1 and 9 of the Treaty of July 1, 1852, the Tenth Circuit found the Treaty to be an "expression of federal dominance on the reservation" which completely preempted the application of state law even to non-Indians on the Reservation.[5]

The full text of these provisions, Appendix at 54a, does not, however, sustain the interpretation of the court below. Read in full, these treaty provisions mean only that the tribe and its members recognized the sovereignty of the United States against which they had previously waged war, and that the United States would, in turn, provide a place for the tribe to live. The meaning and significance accorded these treaty stipulations by the court below is not only at variance with the full text, it is also inconsistent with another decision of the Tenth Circuit, *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981), *reh. denied*, 102 S.Ct. 1296 (1982), and with the Ninth Circuit decision in *United States v. Montana*, 604 F.2d 1162. In *Mescalero Apache Tribe v. O'Cheskey*, the Treaty of July 1, 1852, was not deemed to preempt application of New Mexico's gross receipts tax to non-Indians doing business with the tribe on the reservation. The court in *O'Cheskey* stated:

> [The Treaty] was an agreement entered into with *some* Apaches, including some Mescaleros, and was ratified by Congress .... It was a treaty of 'peace and friendship.' As this was all it

[5] The Court emphasized the words "exclusively" in Article 1 and "United States" in Article 9 and thereby concluded that the Treaty created for all time an exclusive federal enclave for the Mescalero Apache Tribe in which the game and fish laws of New Mexico would never apply to any one under any circumstances.

> purported to be, it established no rights generally for either party nor any rights in land. See *Choate v. Trapp*, 224 U.S. 665 .... The Mescaleros were then under the complete sovereignty of the United States. The Treaty thus does not appear to be of any significance as to our problem.

625 F.2d at 971. The court below failed to explain why the so-called "federal dominance" expressed in the Treaty preempts state game and fish laws in this case but did not preempt gross receipts tax laws in the *O'Cheskey* case. In *United States v. Montana*, the Ninth Circuit dealt with the Treaty of 1851 with the Crow Tribe, which contains provisions similar to those involved here, and did not deem that treaty to preempt application of state laws to non-Indians hunting and fishing on the Crow Reservation.

(2) *The New Mexico Enabling Act.* The court below concluded that the Enabling Act for New Mexico, 36 Stat. 557 (1910), which places Indian lands in New Mexico "under the absolute jurisdiction and control of the Congress of the United States," taken in conjunction with the "exclusivity" language of the Treaty of July 1, 1852, preempts state law: "In the area of resource management, the treaty language in this case suggests the 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." Appendix at 22a.

As the foregoing discussion indicates, there simply is no "exclusivity" language in the Treaty of July 1, 1852. Moreover, the decision of the court below is contrary to this Court's decision in *Organized Village of Kake v. Egan*, 369 U.S. 60 (1961), to the Ninth Circuit's decision in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, and the Tenth Circuit's own decisions in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, and *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir. 1979).

In *Organized Village of Kake*, this Court interpreted section 4 of the Alaska Statehood Act in which the state disclaimed all right to and the United States retained "absolute jurisdiction and control" over, *inter alia*, lands

and property held by Indians. After an extensive review of case law and legislative history, this Court concluded that:

> [T]he words "absolute jurisdiction and control" are not intended to oust the State completely from regulation of Indian "property" (including fishing rights). "Absolute" in Section 4 carries the gloss of its predecessor statutes meaning undiminished not exclusive.

369 U.S. at 71. Also in direct conflict with the decision of the Tenth Circuit is *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, in which the Ninth Circuit held that the Arizona Enabling Act, which is identical in this regard to New Mexico's, forced Arizona to disclaim only its proprietary interest in Indian land, not its governmental or regulatory authority over that land. Thus, the Court in that case concluded:

> . . . Arizona's disclaimer does not preclude it from imposing a license fee on non-Indians hunting and fishing on a reservation, even though such a fee is related to reservation realty. A state license fee is not a property tax or a tax on a tribe's own license income; the fee is paid by "nonmembers of the Tribes," *id.*, and has only an indirect effect on the tribal treasury.

649 F.2d at 1280.

In *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, the Tenth Circuit itself actually rejected the notion that the New Mexico Enabling Act established Indian reservations as exclusive federal jurisdictional enclaves. In *Jicarilla Apache Tribe*, the Tenth Circuit stated:

> By 1910, the date of the enactment of New Mexico's Enabling Act, both the Congress and the United States Supreme Court had established a procedure whereby Indian Reservations might be created as exclusive federal enclaves within states and territories similar to military

> reservations created under the Arsenals and Dockyards Clause (U.S. Const. Art. I, § 8, Cl. 17). This procedure was followed exclusively only with respect to the Kansas Indians. A different procedure was followed with respect to the grant of New Mexico's statehood. In any event, today there is no exclusive federal jurisdictional Indian Reservation in the United States.

601 F.2d at 1129. The Tenth Circuit's decision in the instant case therefore departs from previous decisions of this Court, the Ninth Circuit, and of the Tenth Circuit itself.

(3) *Indian Reorganization Act of 1934.* The Tenth Circuit also inferred preemption of state authority over non-Indian hunting and fishing from the language of the Indian Reorganization Act of 1934 which "reconfirms" in Indian tribes organizing under the Act "all powers vested in any Indian tribe . . . by existing law." The court below reasoned that tribal power over reservation hunting and fishing was "unquestionably vested" prior to 1934, and thus its "reconfirmation" in the Indian Reorganization Act gave the Act itself preemptive effect. The court further observed that tribal ordinances regarding hunting and fishing on the reservation enacted pursuant to the Indian Reorganization Act may themselves serve to preempt state law on the reservation.

The lower court's conclusions in this regard are contrary to this Court's decision in *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978); the Ninth Circuit's decisions in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274; *United States v. Montana*, 604 F.2d 1162, and *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977), and the decision of the U.S. District Court for the Southern District of California in *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

With respect to the effect of the Indian Reorganization Act of 1934, this Court in *Oliphant v. Suquamish Tribe* has said:

> Respondents do contend that Congress has "confirmed" the power of Indian tribes to try and punish non-Indians through the Indian Reorganization Act of 1934, 25 U.S.C. § 476, and the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302. Neither Act, however, addresses, let alone "confirms", tribal criminal jurisdiction over non-Indians. The Indian Reorganization Act merely gives each Indian tribe the right "to organize for its common welfare" and to "adopt an appropriate constitution and bylaws." With certain specific additions not relevant here, the tribal council is to have such powers as are vested "by existing law."

435 U.S. at 196, n.6. Thus, whatever powers the Mescalero Apache Tribe may have "by existing law" with respect to regulating hunting and fishing on the Reservation,[6] this Court has determined that the Indian Reorganization Act neither confirms such powers nor do such powers somehow infuse the Act with preemptive effect with respect to the applicability of state law to non-Indians on Indian land. Moreover, in *White Mountain Apache Tribe v. Arizona*, and *United States v. Montana*, the Ninth Circuit clearly rejected the notion that the Indian Reorganization Act delegated to Indian tribes the "far-reaching authority" to preempt state game and fish laws otherwise applicable to non-Indians by the adoption of either general tribal wildlife codes or specific regulations related to a tribal hunting and fishing business enterprise.

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[6] Apart from its power as a landowner to exclude non-Indians from the Reservation or to place conditions on their entry onto the Reservation, an Indian Tribe may enforce police regulations only against its own members. See *United States v. Wheeler*, 435 U.S. 313; *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

(4) *Federal Development Assistance.* The court below also found preemption of state law in the federal assistance provided to the Mescalero Apache Tribe by the Department of the Interior in the development of a tribal hunting and fishing business enterprise. This conclusion on the part of the court likewise conflicts with decisions of this Court and with at least one other decision of the Tenth Circuit itself.

The federal assistance which the court below considered to be preemptive of state law was a donation of elk, fish stocking of reservation lakes, technical assistance on fish management, and aerial surveys and animal pellet studies by a Bureau of Indian Affairs range conservationist to assess wildlife populations.

The finding of the Tenth Circuit that occasional federal assistance to the tribe such as this preempts the application of state law to non-Indian hunters and anglers on the Reservation is wholly inconsistent with the preemption standard expressed by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136. In *Bracker*, this Court declared that congressional enactments and comprehensive implementing regulations establishing pervasive federal regulatory scheme (as opposed to merely federal material and technical assistance) must be involved in order to oust state law from application on an Indian reservation. Indeed, as explained in *Bracker:*

> Our decision today is based on the preemptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Company v. Arizona Tax Commission, supra*, leaves no room for the additional burdens sought to be imposed by state laws.

448 U.S. at 151, n.15.

In *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), federal involvement in an Indian commercial enterprise was found not to preempt the application of

state law to the tribal activity. In that case, the Bureau of Indian Affairs had conducted a feasibility study, equipment and construction money had been provided by a loan from the federal government, and the necessary land was supplied by the United States Forest Service on a long-term lease to the tribe. The degree of federal activity in the instant case falls below that involved in the *Jones* case. And, in *White Mountain Apache Tribe v. Arizona*, the Ninth Circuit declined to find preemption of state regulation from virtually identical federal involvement in the White Mountain Apache hunting and fishing enterprise as that involved in this case.

Moreover, the Tenth Circuit itself acknowledged, in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967, that federal participation and interest in a particular Indian enterprise does not alone preempt state law from application to *non-Indians* involved in the venture. In that case, the Tenth Circuit stated:

> Finally, the extent of the federal government's role in this area, as a measure of federal interest in Indian affairs, is significant. Federal participation and interest in this particular business venture is extensive, but that alone is not enough to immunize these contractors from state taxation.

625 F.2d at 974 (concurring opinion). The decision of the court below that the measure of federal assistance involved in this case preempts state law cannot be squared with decisions of this Court, rulings of other circuits or with other decisions of the Tenth Circuit itself.

(5) *Public Law 280.* Finally, the Court of Appeals determined that federal preemption resulted from "the negative inferences from Public Law 280." Appendix at 21a. The court reasoned that because Public Law 280, 18

U.S.C. § 1162 (b),[7] protects previously conferred or "traditional" Indian hunting and fishing rights from being hindered even in those states which accept Public Law 280 jurisdiction, a non-Public Law 280 state like New Mexico may not, *a fortiori*, hinder such rights.

This conclusion, of necessity, is based on the Tenth Circuit's previous assumption that the Treaty of July 1, 1852, afforded "traditional hunting and fishing rights" to the Mescalero Apache Tribe on the basis that it did not expressly withdraw them. This interpretation of the Treaty of July 1, 1852, was, in turn, a reflection of the Court's misperception of the significance of "inherent" tribal sovereignty. In fact, the Treaty of July 1, 1852, afforded no such rights to the Mescalero Apache Tribe, particularly insofar as non-Indians are concerned, and thus Public Law 280 would not prohibit New Mexico, even if it were a Public Law 280 State, from exercising the authority it seeks to exercise in this case.

This holding of the court below stands in conflict with the Ninth Circuit decision in *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253, where the court interpreted Public Law 280 to preserve rights and immunities granted to an Indian tribe but not to extend such rights or immunities to non-Indians undertaking activity on a reservation. Accordingly, Public Law 280 did not prevent the imposition of a state possessory interest tax on a non-Indian lessee of reservation land.[8] If Public Law 280 does

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[7] The Court of Appeals referred to the following proviso in Public Law 280:

> Nothing in this section . . . shall deprive any Indian or Indian tribe . . . of any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing, or the control, licensing or regulation thereof.

[8] On the same reasoning, state fish and game laws were held applicable to non-Indians on an Indian reservation in *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

not directly preempt state law from application to non-Indians on Indian land, it surely does not do so by "negative inferences."

The decision of the court below thus introduces wide variation among the circuits not only as to the preemptive force of particular enactments by Congress and treaty provisions but also as to the gauge to be used in the measurement. The divergent results in the lower courts on these important jurisdictional issues cannot be brought to rest by ambiguous formulas; neither do the problems created improve with age. This Court should provide guidance.

B. Tribal Self Government.

In its opinion on remand, the Tenth Circuit also confirmed its previous ruling that application of New Mexico game and fish laws to non-Indians on the Mescalero Apache Reservation would infringe on the right of the tribe to govern itself. This conclusion stems from the Tenth Circuit's persistent view that state regulation of non-Indian hunting and fishing on the Mescalero Apache Reservation would interfere with tribal efforts "to control, exploit, and regulate tribal resources" for tribal economic gain. Appendix at 6a. Specifically, the court below perceived that state regulation would (1) financially impair the tribe's hunting and fishing business enterprise; (2) interfere with the tribal regulatory program over its "reservation's resources;" and (3) deny the tribe an opportunity to develop its own system of wildlife management. Appendix at 26a-28a.

There is simply no factual foundation for the Tenth Circuit's position. Indeed, the facts of record refute the Court's conclusions.[9] That aside, however, the Court's conclusion of infringement goes well beyond the notion of preserving tribal autonomy over the internal affairs of its members, and radically departs from decisions of this Court and other federal courts on the specific bases for the

[9] See Statement of the Case, *supra*.

infringement finding. On the question of financial impairment of the tribe's commercial activity, for example, the decision below is at odds with the decisions of this Court in *State of Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973); *Oklahoma Tax Commission v. Texas Company*, 336 U.S. 342 (1949); *Thomas v. Gay*, 169 U.S. 264 (1898); and with decisions of other circuits in *White Earth Band of Chippewa Indians v. Alexander*, No. 81-1805; *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274; *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253; and with the decision of the Tenth Circuit itself in *Mescalero Apache Tribe v. O'Cheskey*, 625 F.2d 967. Contrary to the Tenth Circuit's view, these cases hold that imposition of a non-discriminatory tax or regulatory system on non-Indians doing business with an Indian tribe is permissible even if it results in an economic burden on the tribe. *Moe v. Confederated Salish and Kootenai Tribe*, 425 U.S. 463 (1976).

With respect to the Tenth Circuit's holding that state regulation would interfere with the tribal regulatory program and would deny the tribe an opportunity to develop a system of wildlife management, the court below has reached a result which directly conflicts with those of the Ninth Circuit in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274; *United States v. Montana*, 604 F.2d 1162; and *Fort Mojave Tribe v. County of San Bernadino*, 543 F.2d 1253; and with the decision reached by the Eighth Circuit in *White Earth Band of Chippewa Indians v. Alexander*, No. 81-1805, as well as with the ruling of the Court in *State of California v. Quechan Tribe of Indians*, 424 F.Supp. 969.

Those cases recognize that non-discriminatory, state regulation against only non-Indians on Indian land does not deprive a tribe of its right to impose its own regulatory measures or to adopt its own conservation practices. These options remaining open to the tribe, tribal self-government is not impeded. The Tenth Circuit's conclusion to the contrary stands alone.

C. State Interests.

New Mexico plainly has a legitimate interest in preserving and regulating the exploitation by non-Indians of the wildlife resources of the state which range on and off the Reservation. As stated by the Ninth Circuit in *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274, 1283 (1981):

> States have an obvious interest in conserving animals which, if protected, would move off reservations onto state lands; moreover, states have an interest in animals that migrate from state lands where they survive by virtue of the States' conservation efforts, onto reservations.

The holding of the court below, starting as it does from the premise of territorial sovereignty in the tribe, provides no analytical framework in which to weigh the legitimate interests of the state.

The Mescalero Apache Reservation is one of twenty-six Indian reservations and pueblos located within the State of New Mexico. These twenty-six Indian enclaves comprise 7,348,563 acres or 11,482 square miles. Each of these other Indian enclaves in New Mexico could become a haven for non-Indian activity free of State law on the model of the Mescalero Apache enterprise. Efficient, effectual statewide game management would be impossible under these circumstances.

On a larger scale, if the decision below stands, Indian tribes all over the country may adopt the Mescalero model featuring tribal operation of a commercial hunting and fishing enterprise in an attempt to free their virtually exclusive non-Indian patronage from the requirements of state law and to avail themselves of the accompanying competitive advantages. Indeed, this type of enterprise is already spreading. See *State of Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134; *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir.

1978), petition for writ of certiorari voluntarily dismissed, 442 U.S. 939 (1980); *White Mountain Apache Tribe v. Arizona*, 649 F.2d 1274 (9th Cir. 1981). Moreover, the Mescalero model is now being used with respect to other Indian enterprises such as the operation of gambling and liquor facilities in an effort to immunize non-Indian patrons from state law for the commercial advantage of the Indian tribe. See, for example, *United States v. State of New Mexico*, 590 F.2d 323 (10th Cir. 1978); *Seminole Tribe of Florida v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 102 S.Ct. 1717 (1982); *Rehner v. Rice*, No. 77-2409 (9th Cir. filed June 8, 1982).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 25, 1982

IN THE

Supreme Court of the United States

No. A-1125

NEW MEXICO and HAROLD F. OLSON, Etc.,
Petitioners

v.

MESCALERO APACHE TRIBE

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 25, 1982.

/s/ BYRON R. WHITE
Associate Justice of the Supreme Court of the United States

Dated this 25th day of June, 1982.

United States Court of Appeals
For the Tenth Circuit

MARCH TERM—April 26, 1982

Before Honorable William E. Doyle, Honorable Jean C. Breitenstein, and Honorable Monroe G. McKay, Circuit Judges

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Judgment
No. 78-1790
(D.C. No. 77-395-M)

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,

v.

STATE OF NEW MEXICO and WILLIAM S. HUEY,
Individually and as Director of
New Mexico Department of Game and Fish,
or his Successors in Office,
Defendants-Appellants.

INTERNATIONAL ASSOCIATION OF FISH AND
WILDLIFE AGENCIES,
UNITED STATES OF AMERICA,
JICARILLA APACHE TRIBE, STATE OF UTAH,
Amici Curiae

This matter comes on for further consideration after remand by the Supreme Court of the United States, and was briefed by the parties in light of Montana v. United States, 450 U.S. ___ (1981).

Upon consideration whereof, it is ordered that the judgment of the United States District Court for the District of New Mexico and the judgment of this Court in the captioned cause are affirmed.

The judgment of this Court, ordered vacated on May 12, 1981, and the opinion filed August 13, 1980, are ordered reinstated.

As ordered by the Supreme Court, the petitioners New Mexico, et al, recover from Mescalero Apache Tribe the sum of $200.00 for Clerk's costs in that court.

/S/ HOWARD K. PHILLIPS

Howard K. Phillips, Clerk

PUBLISH

United States Court of Appeals

TENTH CIRCUIT

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,

vs.

No. 78-1790

STATE OF NEW MEXICO and
HAROLD F. OLSON, individually
and as Director of the New
Mexico Department of Game and
Fish, or his successors in office,
Defendants-Appellants.

OPINION ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. Civil Case No. 77-395-M)

On the Briefs:

Jeff Bingaman, Attorney General; Thomas L. Dunigan, Deputy Attorney General; Thomas Patrick Whelan, Jr., Assistant Attorney General, Santa Fe, New Mexico, for Defendants-Appellants.

George E. Fettinger and Kim Jerome Gottschalk of Fettinger & Bloom, Alamogordo, New Mexico, for Plaintiff-Appellee.

Carol E. Dinkins, Assistant Attorney General; Robert L. Klarquist and Edward J. Shawaker, Department of Justice, Washington, D.C. for the United States as amicus curiae.

B. Reid Haltom and Marcia L. Green of Nordhaus, Haltom & Taylor, Albuquerque, New Mexico, for the Jicarilla Apache Tribe as amicus curiae.

Before DOYLE, BREITENSTEIN and McKAY, Circuit Judges.

McKAY, Circuit Judge.

In *Mescalero Apache Tribe v. New Mexico*, 630 F.2d 724 (10th Cir. 1980), this court affirmed an order of the district court enjoining the State of New Mexico from enforcing its game laws against non-Indians who hunt and fish within the boundaries of the Mescalero Apache Indian Reservation. Subsequently the United States Supreme Court granted the State's petition for a writ of certiorari, vacated this court's judgment, and remanded the case for further consideration by this court in light of *Montana v. United States*, 450 U.S. 544 (1981).

While this court was considering *Mescalero v. New Mexico* on remand, the Supreme Court decided *Merrion v. Jicarilla Apache Tribe*, 102 S.Ct. 894 (1982), in which the Court affirmed the authority of an Indian tribe to impose a severance tax on non-Indian mining activities on the Tribe's reservation. In *Merrion* the Court held that "the Tribe's authority to tax non-Indians who conduct business on the reservation ... is an inherent power necessary to tribal self-government and territorial management." 102 S.Ct. at 903. In the Court's opinion, that authority "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services," as well as from the tribe's authority to exclude non-Indians from tribal land. *Id.* at 901. The Court's decision in *Merrion v. Jicarilla* convinces us that *Montana v. United States* does not dictate a result different from that originally reached by this court in *Mescalero v. New Mexico*.

Montana v. United States deals with "the sources and scope of the power of [the Crow] Indian [T]ribe to regulate fishing and hunting by non-Indians on lands within its reservation *owned in fee simple by non-Indians.*" 450 U.S. at 547 (emphasis added). *Mescalero v. New Mexico*, however, involves the question of whether a state has the authority to regulate non-Indian hunting on Indian-owned land within a reservation.[1] In contrast to *Montana v. United States*, but like *Merrion v. Jicarilla*, the case before us deals with the broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands.

In both *Montana v. United States* and *Merrion v. Jicarilla*, the Supreme Court reiterated that Indian tribes retain inherent sovereignty over their own reservations in matters concerning self-government and internal relations. 102 S.Ct. at 901; 450 U.S. at 565-66. In the case before us, the Mescalero Apache Tribe has carefully built up and managed the wildlife on its reservation without the aid of the state and is seeking to manage its resources for economic return. There is no evidence that the state supplies any management services on the reservation where the hunting takes place. Under these circumstances, we are convinced that the Tribe's inherent sovereignty permits it to determine how its reservation's resources shall best be regulated. Dual regulation of the use of these resources would interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on its reservation. The state, therefore, cannot interfere by attempting to control non-Indian hunting and fishing conducted exclusively on reservation land held by the Tribe any more than it could do so if the activities in question took place in one of New Mexico's neighboring states.

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[1] Unlike the Crow Reservation, where only approximately 17% of the land is now held in trust for the Tribe, and 28% is held in fee by non-Indians, the Mescalero Apache Reservation contains 460,000 acres belonging to the Tribe, but only a negligible 180-85 acres that are held in fee by non-Indians.

It is clear to this court that the principles enunciated in *Merrion*, rather than those enunciated in *Montana v. United States* govern and confirm our prior decision. Therefore, the judgment of the district court is affirmed, and the previous decision of this court is ordered reinstated.

United States Court of Appeals

FOR THE TENTH CIRCUIT

JULY TERM—August 13, 1980

Before Honorable William E. Doyle, Honorable Jean S. Breitenstein, and Honorable Monroe G. McKay, Circuit Judges

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,
vs.
STATE OF NEW MEXICO and WILLIAM S. HUEY, Individually and as Director of New Mexico Department of Game and Fish, or his Successors in Office,
Defendants-Appellants,
INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES, UNITED STATES OF AMERICA, JICARILLA APACHE TRIBE, STATE OF UTAH,
Amici Curiae.

JUDGMENT
No. 78-1790
(D.C. No. 77-395-M)

This cause came on to be heard on the record on appeal from the United States District Court for the District of New Mexico, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed. Judge Breitenstein concurs.

Test .....

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PUBLISH

United States Court of Appeals

TENTH CIRCUIT

MESCALERO APACHE TRIBE,
Plaintiff-Appellee,

v. No. 78-1790

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of New Mexico
Department of Game and Fish,
or his Successors in Office,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO (D.C. Civil Case No. 77-395-M)

Jeff Bingaman, Attorney General, and Thomas L. Dunigan, Deputy Attorney General (Thomas Patrick Whelan, Jr., Assistant Attorney General, with them on the briefs), Santa Fe, New Mexico, for Defendants-Appellants.

George E. Fettinger (Kim Jerome Gottschalk with him on the brief), Fettinger & Bloom, Alamogordo, New Mexico, for Plaintiff-Appellee.

Steven E. Carroll, Attorney (James W. Moorman, Assistant Attorney General; Robert L. Klarquist and Edward J. Shawaker, Attorneys, on the brief), Department of Justice, Washington, D.C., for the United States as amicus curiae.

Paul A. Lenzini and Susan A. Goltz, Attorneys, Chapman, Duff and Paul, Washington, D.C., filed an amicus curiae brief for the International Association of Fish and Wildlife Agencies.

Daniel H. Israel, Native American Rights Fund, Boulder, Colorado; Robert Nordhaus and Adelia W. Kearny, Nordhaus, Moses & Dunn, Albuquerque, New Mexico, filed an amicus curiae brief for the Jicarilla Apache Tribe.

Robert B. Hansen, Utah Attorney General; Richard L. Dewsnup, Assistant Attorney General; and Dallin W. Jensen, Assistant Attorney General, filed an amicus curiae brief for the state of Utah.

Before DOYLE, BREITENSTEIN and McKAY, Circuit Judges

McKAY, Circuit Judge.

This case involves a challenge to the State of New Mexico's attempt to regulate the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache reservation. The Tribe carried its challenge to the district court where it secured a judgment declaring that the State may not apply its hunting and fishing laws to any person, Indian or non-Indian, within the boundaries of the tribal reservation. The court also enjoined the State from enforcing its game laws "against any person either on the Reservation or after they [*sic*] have left the Reservation for acts done on the Reservation." Record vol. 1, at 221. The State concedes its lack of jurisdiction over tribal members on the reservation, but appeals the district court's resolution as to non-members of the Tribe.[1]

[1] For most purposes, the important distinction is between tribal members and non-members, not between Indians and non-Indians. Members of other tribes generally visit the Mescalero reservation on the same footing as non-Indians. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 48 U.S.L.W. 4668, 4675 (1980).

In 1977 the Tribe, as part of "an extensive tourism program designed to bring income and employment to the Reservation,"[2] Record, vol. 1, at 205, adopted various hunting and fishing ordinances to improve management of reservation wildlife resources. These ordinances were adopted pursuant to the tribal constitution and were duly approved by the Secretary of the Interior. Some of the ordinances are clearly inconsistent with state laws.[3] For example, the Tribe specifically does not require that a hunter on its reservation purchase a state license and, in contrast to state law, the Tribe permits elk and antelope hunters to purchase permits in consecutive years. In addition, tribal hunting seasons do not all correspond with those of the State, and bag limits differ. By obeying the more restrictive of the regulations, a non-member hunter on the reservation could conform his behavior to the dictates of both Tribe and State. His doing so, however, would render much of the tribal regulatory scheme a nullity.

The revenue derived directly and indirectly[4] from visiting sportsmen comprises a significant portion of the tribal budget, but reservation hunting and fishing by non-members is but a minuscule part of the overall state

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[2] The parties stipulated that "[t]he purpose of the tourism program is to provide income for the Mescalero Apache Tribe which may be used for its governmental purposes and economic development." Record, vol. 1, at 121-22.

[3] The Tribe may be seeking to create jurisdictional disputes. However, no negative inference should be attached to such a posture. In fact, a clear intent to preempt state jurisdiction is an element in the Tribe's favor. *See* Confederated Tribes of the Colville Indian Reservation, 591 F.2d 89, 91 (9th Cir. 1979).

[4] The Tribe has erected a resort complex where many sportsmen stay while on the reservation. Because of the recreation facilities at the resort, many nonhunters accompany the sportsmen. In recent years direct tribal income from hunting and fishing activities has exceeded $250,000 per year. The indirect revenues increase that total. Record, vol. 1, at 135.

total.[5] Although the State argues that wildlife management *efficiency* requires its jurisdiction over reservation activities, no claim is made that any species is endangered. *Cf. Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 176-77 (1977). In fact, the State agrees that tribal management of reservation wildlife resources has been exemplary, and in conformance with accepted wildlife management procedures. Record, vol. 1, at 134. The Tribe maintains a large, well-trained enforcement staff and receives support from the Bureau of Indian Affairs.

In the factual situation presented by this case, the State is unable to claim that either it or its lands played any significant role in the creation and preservation of the reservation wildlife resources. Instead, much of the reservation wildlife is effectively a creation of the Tribe and the federal government. For example, the antelope population on the reservation is non-migratory, and few animals ever cross the boundaries. In recent years, the herd's protection has been entirely in tribal hands. Furthermore, the Tribe has taken affirmative steps to build an elk herd. Prior to 1966, only 13 elk grazed in the general area of the reservation. In 1966-67, the National Park Service donated 162 elk. Through considerable range development, the Tribe removed cattle from direct competition with the elk for grazing land. The elk herd has grown to 1200, many of which wander off the reservation during part of the year. The migratory elk thus provide significant hunting opportunities for non-members outside the reservation, and the Tribe, despite its fundamental role in herd development, makes no attempt to limit that hunting.

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[5] For example, in a recent year the Tribe sold 50 elk licenses, while the state sold 14,000. Ten tribal antelope licenses were available, compared to 3500 for the state. Tribal deer licenses permitted the taking of 500 deer; the State issued 100,000 licenses.

The reservation has no natural lakes. Several man-made lakes have been constructed with federal funds and are stocked from a national fish hatchery on the reservation. Federal officials from the hatchery also provide the Tribe with technical assistance. The State has never stocked reservation lakes and no longer stocks any reservation streams. The entire tribal fishing program now exists independent of the State.

I. Justiciability

Before proceeding to the merits, we must dispose of several preliminary matters raised by the State. The State challenges, as it unsuccessfully did below, the Tribe's right to bring this suit. The State asserts that the Tribe has no standing and that the suit is otherwise not justiciable.

On the standing issue, the State argues that "[t]he Tribe is seeking to enjoin the enforcement of State penal statutes which do not apply to it and which do not threaten it or its members in any real, direct and immediate sense." Brief for Appellant at 20. In the State's view, a challenge to the state regulations may be prosecuted only by an aggrieved non-member sportsman. Since the Tribe has sold nearly all of its available hunting and fishing permits,[6] the Tribe has allegedly suffered no revenue losses and no other "injury in fact" by the regulations the State would impose on non-member sportsmen.

The State's understanding of standing requirements is overly narrow. For purposes of standing, federal courts

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[6] In the first year that tribal antelope licenses were available, only six of ten were sold. The Tribe has sold all other available licenses, however, and we may safely assume that the antelope license figures reflect a temporary aberration.

may certainly consider the principles of elementary economics. The State's imposition of higher costs on individual sportmen clearly limits the Tribe's ability to raise the prices of its own licenses. *Cf. Agua Caliente Band of Mission Indians v. County of Riverside*, 442 F.2d 1184, 1186 (9th Cir. 1971). We have no reason to assume that the demand curve for reservation hunting and fishing is so inelastic that the Tribe could charge and receive any imaginable price for its licenses. Even though all tribal licenses are now sold, and applications for licenses exceed the number available, that fact merely reflects the Tribe's conservative adjustment to market forces in devising its own fee structure. Similarly, other conflicts between the tribal and state regulatory structures—*e.g.*, variations in hunting seasons—necessarily deter some non-member hunters from entering the reservation at some times. These conflicts affect the Tribe's own regulatory scheme. They also influence the prices the Tribe may charge and impinge on the Tribe's revenue-raising powers. These effects are not merely speculative, but are the straightforward and immediate results of economic forces. *Cf. United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 683-90 (1973).

Beyond economics, the Tribe has another legitimate basis for standing. When one sovereign entity is alleged to have usurped the authority lawfully belonging to another, the injured sovereign must have standing to challenge the usurpation. Other circuits have routinely found standing, without discussion, when Indian tribes have sought judgments that states were unlawfully interfering with tribal regulation of hunting and fishing. *See, e.g., Confederated Tribes of the Colville Indian Reservation v. Washington*, 591

F.2d 89 (9th Cir. 1979); *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir. 1978).[7]

No other barrier to justiciability is present. The impact of the state regulation upon the Tribe is "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967). The limits of state jurisdiction on the reservation is an issue now as ripe for resolution as it will ever be. The State has made clear that prosecution of non-member violators of state game laws, with the attendant effects on tribal regulation and revenue-raising, is intended and probable. Record, vol. 1, at 204 *Cf. Poe v. Ullman*, 367 U.S. 497, 501-2 (1961).

Finally, all indispensable parties are named in the suit. As the district court noted, "A determination that New Mexico game laws are not applicable to non-Indian activity within the Mescalero Apache Reservation cannot injuriously affect the interests of the United States...." Record, vol. 1, at 204. In addition, "no act would be required of the Secretary [of the Interior] regardless of the outcome of the suit." *Id.* at 205.

II. Federal Preemption

Any attempt by a state to exercise regulatory powers within the confines of a federally recognized, "semi-independent" Indian reservation is precluded if the subject matter has been preempted by federal law or if the

[7] Since standing is in part a constitutional concept, a federal court has an obligation to consider the issue even if the parties do not raise it. The lack of discussion in these cases therefore cannot reflect only party failure to press the standing issue.

state regulations infringe on the tribe's rights of self-government. *White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4899 (1980). Accordingly, in this jurisdictional dispute between a state government and an Indian tribe, we must first determine whether the applicable treaty and federal statutes, read against the "backdrop" of Indian sovereignty, preempt exercises of state power. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690-91 (1965). Under a standard of construction followed from the time of the Marshall Court, we must construe the applicable treaty and statutes liberally in order to further Indian interests. *See, e.g., Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *McClanahan v. Arizona State Tax Commission*, 411 U.S. at 174; *Squire v. Copoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582 (1832).*

The sovereign powers of the Tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage. The historical relationship between Indian tribes, their lands, and the wild game thereon has of necessity been one of great interdependence. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). After a careful, thoughtful analysis, the district court properly determined that, before the signing of the Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852), the Tribe "had

* The applicable treaty itself mandates "liberal construction . . . to the end that . . . the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." Treaty with the Apaches, July 1, 1852, art. 11, 10 Stat. 980 (1852).

inherent and complete authority to control the fish and game found within the confines of the tribal territory." Record, vol. 1, at 208. Since the treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," *Id.* (quoting *United States v. Winans*, 198 U.S. at 381), the Tribe retains its authority even though the treaty itself did not fix the boundaries of the tribal reservation.[9] *Cf. Antoine v. Washington*, 420 U.S. 194 (1975). Abrogation of any rights protected by treaty, particularly fundamental hunting and fishing privileges, must be explicit to be effective, *see Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968), and no congressional enactment here meets that standard. *See United States v. Wheeler*, 435 U.S. 313, 323 (1978).

The Tribe's inherent authority stems largely from the traditional reliance on wild game for basic survival needs. *See* F. Cohen, *Handbook of Federal Indian Law* 286 (1942). However, the Tribe's historical use of only some species within its territory does not mean that the game control powers reserved by treaty are less than all-encompassing. It is quite irrelevant whether the Mescalero at one time were primarily hunters, fishermen or gatherers. At the treaty's signing, the United States must certainly have understood that the Tribe could alter its use of wildlife as conditions changed. For example, "[it is] inconceivable that the United States intended to withhold from the Indians the right to sustain themselves from any source of food which might be available on their reservation." *United States v. Finch*, 548 F.2d 822, 832 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676 (1977).

The Tribe's sovereign powers are not, of course, limited to control of wildlife. The Tribe's historical powers

[9] The treaty mandated creation of a new tribal territory, but the actual boundaries of the reservation were set by a series of executive orders from 1873 until 1883.

extend to the territory itself. The State acknowledges that the Tribe has, at a minimum, the power of any landowner to exclude non-official persons from the reservation.[10] In the State's view, the Tribe may altogether forbid permission to hunt and fish or may condition the grant of permission upon compliance with state laws, but the Tribe may not exempt a non-member hunter from the application of state laws. The power of a landowner, however, provides only one source—and a secondary one—of tribal authority. *See Powers of Indian Tribes*, 55 Interior Dec. 14, 48-50 (1934). The Supreme Court has repeatedly stressed "that Indian tribes are unique aggregations possessing attributes of sovereignty over both their members *and their territory*; they are 'a separate people' possessing 'the power of regulating their internal *and social relations*.'" *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (emphasis added) (citations omitted) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)). *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 541-43 (10th Cir. 1980); *United States v. New Mexico*, 590 F.2d 323, 327-28 (10th Cir. 1978) ("Indian nations [are] distinct political communities, having territorial boundaries in which their authority is exclusive"). In its most recent statement, the Court "emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevan to the preemption inquiry; . . . it

[10] In 1969 the Tribe informed the State that its game and fish officers would be welcome only if they obtained tribal permission to enter the reservation. The State has honored the Tribe's request, but it does not concede the Tribe's power to exclude officials. Brief for Appellants at 9-10. Because of our resolution of the case, we do not reach the issue of the State's enforcement powers on the reservation. The Supreme Court also has not spoken on this question. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 48 U.S.L.W. 4668, 4675 (1980); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 468 n.6 (1976).

remains an important factor to weigh in determining whether state authority has exceeded the permissible limits." *White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4901 (1980).

The State questions the existence of any inherent tribal powers in this case. It argues that the Tribe could not have exclusive rights in any traditional territory because, in effect, there is no traditional territory: "the Mescaleros were being swept from their lands by a tide of white settlers." Brief for Appellants at 37. If we were to accept the State's argument, we would be enshrining the rather perverse notion that traditional rights are not to be protected in precisely those instances when protection is essential, *i.e.*, when a dominant group has succeeded in temporarily frustrating exercise of those rights. We prefer a view more compatible with the theory of this nation's founding: rights do not cease to exist because a government fails to secure them. *See* The Declaration of Independence (1776).

In regulating game on the reservation, the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a "significant interest." *Cf. Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668, 4673 (1980). This case is therefore quite unlike *Colville*, in which the Court rejected tribal claims to an exemption from state taxation of reservation cigarette sales to non-members. Reservation sales outlets were, except in location, identical to their off-reservation competitors, and the product taxed was in no sense a tribal creation. Unlike the situation in this case, no significant *tribal* interest was involved.

This case is further unlike *Colville* in that here a definite conflict exists between the tribal regulatory

structure and that of the State. In *Colville* the tribal and state taxing schemes were purely revenue-raising in nature, and dual systems of pure taxation are not inherently conflicting. In contrast, dual *regulatory* schemes, as the Court implied, necessarily create mutual dislocations. 48 U.S.L.W. at 4674.[11] It is because of this characteristic of regulation that we presume, when Indian tribes under federal protection seek to regulate *their traditional interests*, that federal law has preempted state jurisdiction. *See* D. Getches, D. Rosenfelt & C. Wilkinson, *Cases and Materials on Federal Indian Law* 295-99 (1979). "[T]hose standards of pre-emption that have emerged in other areas of the law" generally do not apply "*to federal enactments regulating Indian tribes.*" White Mountain Apache Tribe v. *Bracker*, 48 U.S.L.W. 4897, 4899 (1980). As this court has recently emphasized, "[T]he cases stress that *regulatory* powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the state, but when it does so it must be in specific terms."

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[11] In Mescalero Apache Tribe v. O'Cheskey, No. 77-2102 (10th Cir. June 5, 1980) (en banc), we were also not faced with dual regulatory schemes. The state tax there at issue, like the *Colville* tax, was purely revenue-raising in nature, and the Tribe had not imposed its own taxing scheme. In United States v. Montana, 604 F.2d 1162 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980), the Ninth Circuit upheld dual regulation of hunting and fishing on the Crow reservation. The court assumed, however, that tribal-state cooperation would be "forthcoming." 604 F.2d at 1172. Because of the Mescalero Apache Tribe's clear position in this case, we may make no such assumption. *See also* Confederated Tribes of the Colville Indian Reservation v. Washington, 591 F.2d 89, 91 (9th Cir. 1979) ("tribal government explicitly acknowledged that state jurisdiction would not constitute an obstacle to its efforts").

United States v. *New Mexico*, 590 F.2d 323,328 (10th Cir. 1978) (emphasis added).[12]

As important as sovereignty is in this case, we need not consider whether the Tribe's sovereign powers alone are sufficient to preempt state jurisdiction. The Supreme Court has not ruled on that question but has noted, given the pervasiveness of federal treaties and statutes, that it is "something of a moot question." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 n.8 (1973). *See* Note, *Tribal Preemption*, 54 Wash. L. Rev. 633, 639 (1979). In this case, the treaty and statutory basis for federal preemption is strong. We see as sources of preemption (1) the treaty; (2) the Enabling Act for New Mexico; (3) the Indian Reorganization Act of 1934; (4) the tribal constitution and ordinances enacted pursuant to the IRA; (5) the extensive federal developmental assistance; and (6) the negative inferences from Public Law 280. These factors, considered in light of the Tribe's inherent powers over reservation land and wildlife, compel our conclusion of preemption.

The applicable treaty, as we have noted, implicitly reserves to the Tribe control over reservation hunting and fishing. In addition, the treaty is explicit in its expression of federal dominance on the reservation. In Article 1 of that document, the Tribe submits itself "*exclusively* [to] the laws, jurisdiction, and government of the United

[12] Insofar as other courts have improperly presumed the existence of state jurisdiction in similar cases, their decisions do not control our determination. *See, e.g.*, United States v. Montana, 604 F.2d 1162, 1172 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980). Nor does past participation by the State in reservation wildlife regulation necessarily limit any tribal claim of sovereign powers. *See* Brief for Appellant at 55. Past cooperation of the Tribe with the State reflects nothing more than a temporary waiver of the Tribe's preemptive rights in the hunting and fishing area.

States of America." Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852) (emphasis added).[13] Further, the treaty provides that the *United States* shall "designate, settle, and adjust [the Tribe's] territorial boundaries, and pass and execute ... such laws as may be deemed conducive to the prosperity and happiness of [the Mescalero Apaches]." *Id.*, art. 9, 10 Stat. 980.

The treaty's exclusivity language aids our interpretation of the Enabling Act for New Mexico, 36 Stat. 557 (1910), in which New Mexico Indian lands were placed "under the absolute jurisdiction and control of the Congress of the United States." Although *Organized Village of Kake v. Egan*, 369 U.S. 60, 68 (1962), said that " 'absolute' federal jurisdiction is not invariably exclusive jurisdiction," *Egan* "did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians." *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 176 n.15 (1973). In the area of resource management, the treaty language in this case suggests that "absolute" jurisdiction is indeed "exclusive" jurisdiction.[14]

The tribal constitution gives to the Mescalero Apache Tribal Council the power "[t]o protect and preserve the property, wildlife and natural resources of the tribe, and

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[13] New Mexico does not challenge the validity of the treaty. The parties stipulated that it was signed by a representative of the Tribe. Record, vol. 1, at 118.

[14] The New Mexico Supreme Court has understood the implications of the *McClanahan* clarification of *Egan*. In a case involving the Mescalero Apaches, the court viewed the clarification as a refusal "to extend the concept of concurrent federal and state jurisdiction to cases which arise in areas set aside by treaty for the exclusive use and control of Indians." Chino v. Chino, 90 N.M. 204, 561 P.2d 476, 478 (1977).

to regulate the conduct of trade and the use and disposition of tribal property upon the reservation." Mescalero Apache Tribe Revised Const. art. 11, § 1(c).[15] That constitution was adopted and approved pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. § 476, under which Congress provided that the adoption of a tribal constitution reconfirms in the tribe "all powers vested ... by existing law." The statute thus reconfirms all preexisting powers of the Tribe and itself becomes a source of preempting power. *See White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4899, 4899 n.10 (1980); Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 Iowa L. Rev. 1459, 1463, 1463 n.27 (1979).

Tribal power over reservation hunting and fishing was unquestionably vested prior to 1934. Tribal ordinances enacted to implement traditionally held, and congressionally approved, powers, may themselves serve to preempt the State. The Supreme Court saw another similarly enacted tribal ordinance as the implementation of "an overriding federal policy which is clearly adequate to defeat state jurisdiction." *Fisher v. District Court*, 424 U.S. 382, 390 (1976). Any constitutional limitations on congressional authority to delegate its legislative powers are "less stringent ... where [as here] the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States v. Mazurie*, 419 U.S. 544, 556-57 (1975). The tribal scheme also negates any argument that the Tribe has not manifested an intent to preempt state jurisdiction. *Cf. Confederated Tribes of the Colville Indian Reservation v. Washington*, 591 F.2d 89 (9th Cir. 1979).

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[15] The constitution also provides that "[n]o provision ... shall be construed as a limitation on the inherent residual sovereign powers of the Mescalero Apache Tribe." Mescalero Apache Tribe Revised Const. art. 27, § 1.

The Fourth Circuit has held that extensive federal participation in reservation wildlife development is itself an element indicating federal preemption. *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75, 78 (4th Cir. 1978). In *Eastern Band*, as here, the federal government and the Tribe had developed the reservation fishing program with no state assistance. Where the State plays no role in stocking reservation waters, it "has no perceivable interest in reservation fishing." *Id.*[16] *See White Mountain Apache Tribe v. Bracker*, 48 U.S.L.W. 4897, 4901 (1980). *See also Central Machinery Co. v. Arizona State Tax Commission*, 48 U.S.L.W. 4904 (1980).

Finally, we infer federal preemption from the statutory structure of Public Law 280, 67 Stat. 590 (1953), and its later amendments. Under that statute, New Mexico had the option until 1968 of unilaterally asserting civil and criminal jurisdiction over the Mescalero Apache reservation. It did not do so. *See McClanahan v. Arizona State Tax Commission*, 411 U.S. at 177-79. Even had the State assumed jurisdiction, the statute in its present form specifically protects the tribes from the deprivation of "any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulating thereof." 25 U.S.C. § 1321(b). If those states which accepted Public Law 280 jurisdiction may not hinder traditional hunting and fishing rights, New Mexico *a fortiori* may not do so.

The presumption of federal preemption is clearly not overcome by a treaty and statutory scheme which reassert

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[16] In *Eastern Band*, Chief Judge Haynsworth emphasized that the fishing program was a "purely commercial undertaking" of the Cherokees. 588 F.2d at 79. We believe that the tribal interests are, if anything, enhanced when the purposes of the wildlife regulation are much broader.

the exclusivity of federal and tribal regulation of hunting and fishing. The State may not apply its game laws to persons for acts done on the reservation.[17]

III. Tribal Self-Government

The second test for determining the propriety of state regulation on Indian reservations analyzes the impact of the regulation on tribal self-government. Even if the treaty and statutory scheme, read against the backdrop of sovereignty, were insufficient to create federal preemption, the Tribe's authority is here protected under a tribal self-government analysis.[18]

In the landmark case of *Williams v. Lee*, 358 U.S. 217 (1959), which upheld tribal court jurisdiction over non-Indians, the Supreme Court restated the controlling test: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. To apply that test, a court must "[seek] an accomodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." *Washington v. Confederated Tribes of the Colville Indian*

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[17] Our analysis does not attach independent preemptive significance to 18 U.S.C. § 1165. *Cf.* Central Machinery Co. v. Arizona State Tax Commission, 48 U.S.L.W. 4904 (1980). The import of that statute is addressed in Part V.

[18] We recognize that the preemption and self-government analyses overlap, and that the Supreme Court appears to be gradually collapsing the tests into one. *See* Washington v. Confederated Tribes of the Colville Indian Reservation, 48 U.S.L.W. 4668, 4673-74 (1980). Nonetheless, the two tests continue to provide different analytical perspectives. *See* White Mountain Apache Tribe v. Bracker, 48 U.S.L.W. 4897, 4899 (1980).

Reservation, 48 U.S.L.W. 4668, 4674 (1980). Congress has identified one overriding federal interest by "recogniz-[ing] the obligation of the United States to respond to the strong expression of the Indian people for self-determination." 25 U.S.C. § 450a(a).

In the context of its analysis of the pure-taxation schemes of the tribe and state in *Colville*, the Supreme Court delineated the relevant considerations for the balancing process:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

48 U.S.L.W. at 4674. In the case before us, the scales tip decisively in the Tribe's favor.

Unlike *Colville*, we here have a clear state interference with a traditional tribal regulatory power. To restrict the application of the tribal scheme to members only would be to complicate excessively the enforcement process and to render the very idea of "regulation" an absurdity. Here the Tribe has, with the aid of the federal government, generated the "value . . . on the reservation" which it now seeks to control and whose benefits it seeks to enjoy. The state services received by on-reservation sportsmen are minimal—incidental spillover effects of state activities outside the reservation. In fact, the spillover benefits to the *State* from the tribal conservation

scheme—*e.g.*, development of the migratory elk herd—may well be more significant. Although New Mexico has a legitimate interest in the conservation of its wildlife, the Tribe's activities do not threaten that interest in any way.

The Ninth Circuit held, in *United States* v. *Sanford*, 547 F.2d 1085 (9th Cir. 1976), that Montana's elk hunting laws were applicable to non-Indians hunting on a tribal reservation. The court found no indication that Montana game laws interfered with tribal self-government. *Id.* at 1089. In distinguishing *Sanford*, the Fourth Circuit emphasized that "there was no showing in *Sanford* that the applicability of Montana's game laws . . . would materially affect or frustrate the Indians' governance of themselves or any commercial, conservationist or other program administered by the Indians for their own advantage." *Eastern Band of Cherokee Indians* v. *North Carolina Wildlife Resources Commission* 588 F.2d 75, 78-79 (4th Cir. 1978). In this case, precisely that sort of showing was made.

Washington v. *Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668 (1980), indicates that state regulation of an activity in which a tribe has no significant interest—and where the only effect on the tribe is to limit tribal revenues—does not infringe upon tribal self-government. *Id.* at 4673-74. However, such an effect still remains a factor to be considered, for "financial self-sufficiency" is "one major goal of tribal self-government." *Eastern Bank of Cherokee Indians* v. *North Carolina Wildlife Resources Commission*, 588 F.2d at 78. *See also White Mountain Apache Tribe* v. *Bracker*, 48 U.S.L.W. 4897, 4901 (1980). The unquestioned importance to the Tribe of the game revenues contributed to the district court's determination that tribal self-government was infringed upon, and we affirm that finding.

Finally, we note that underlying the infringement test is a desire to promote the development of indigenous Indian institutions. Congress has declared that its policy is "to help develop and utilize Indian resources . . . to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources." 25 U.S.C § 1451. If we were to permit state interference with the tribal scheme, we would be effectively "deny[ing] Indians the opportunity of developing their own system." *Chino v. Chino*, 90 N.M. 204, 561 P.2d 476, 479 (1977). The federally declared policy of self-determination becomes a mockery if it is subject to defeasance by the State.

IV. Environmental Concerns

This nation has recently begun to recognize the fragility of the natural environment. However, the federal system, whose competing sovereignties serve to protect individual liberties, may not provide the optimum environmental regulatory scheme. The State suggests that, whatever the justification for exclusive tribal regulation under a traditional legal analysis, the seriousness of ecological problems creates an implied exception in this case. The State proclaims that "its management efforts are directed to biological rather than political units," Brief for Appellant at 27, so state regulation should be allowed.

The State vastly overstates its case. Just as wildlife does not respect reservation boundaries, it also does not respect the boundaries of states. The State surely does not mean to suggest that it ignores *state* boundaries in its enforcement efforts. Somewhat inconsistently, the State also maintains that, "[s]ince wildlife exists in widely varying conditions throughout the United States," "there is no dominant federal interest which requires preemption." Brief for Appellant at 55. The State's "biological

units" argument would seem logically to *prefer* federal regulation, because only that regulation can take account of the varying conditions without the restraints of political boundaries. Hence, if ecological necessities were to require changes in constitutional arrangements—a position we certainly do not endorse—the changes would not necessarily be those suggested by the State.

In its ecological analysis, the State misinterprets Supreme Court language declaring the common law duty of a "state in its sovereign capacity" to protect wildlife "for the common benefit of all of its people." *LaCoste v. Department of Conservation*, 263 U.S. 545, 549 (1924). That language does not describe the ecologically optimum vehicle for regulation of wildlife. Nor does it require that only one sovereign, the State, participate in wildlife management. Instead, it is descriptive of the trusteeship duty imposed on *all* sovereigns. The Tribe as a sovereign has undertaken that duty, as the State concedes, in an exemplary fashion, vastly improving the wildlife habitat on the reservation. Therefore, the Ninth Circuit's reasoning in *United States v. Montana*, 604 F.2d 1162 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980)—that simultaneous state regulation is permissible if the stated purpose is "conservation and proper management of game and fish," 604 F.2d at 1166—simply does not extend to this case. Based on the Tribe's record in wildlife management, we, unlike the Ninth Circuit, are *not* "convinced that the preservation and improvement of the stocks of fish and game," *id.* at 1170, requires dual regulation.

V. Enforcement

Our analysis has indicated that the Tribe has plenary power over reservation wildlife management. In this section we consider whether the absence of tribal criminal jurisdiction over non-members necessitates a cutback in that power.

New Mexico relies heavily on an enforcement vacuum that would allegedly exist if the State could not assert its criminal jurisdiction over the Indian reservation. The State insists that "[c]riminal jurisdiction over non-Indian hunters and fisherman [*sic*] is indispensable to effective management." Brief for Appellant at 36. *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978), effectively repudiated tribal criminal jurisdiction over non-members, and 18 U.S.C. § 1165,[19] it is argued, gives the United States jurisdiction over trespass only. Hence, the State maintains that without state criminal sanctions, violations by non-members would go unpunished and enforcement would be impossible. We believe New Mexico has overstated the effect of *Oliphant* and the need for *criminal* jurisdiction, and has underestimated the potential reach of § 1165.

New Mexico's interpretation of *Oliphant* would lead to the untenable conclusion that the Supreme Court implicitly abolished most aspects of tribal sovereignty, while at the same time asserting the continuing validity of that doctrine.[20] Many tribal powers that derive from inherent

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[19] Section 1165, entitled "Hunting, trapping, or fishing on Indian land," reads:

> Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than $200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

[20] Recent Supreme Court reiterations of the continuing importance of tribal sovereignty are legion. *See, e.g.*, Santa

(*footnote continues*)

sovereignty would perhaps best be enforced through criminal sanctions. However, the *Oliphant* Court clearly did not intend to end all traditional tribal authority, including, for example, the taxing power—a power this court has recently reaffirmed. *See Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (10th Cir. 1980)(en banc). In fact, the Supreme Court has recognized the limited nature of the *Oliphant* holding. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 48 U.S.L.W. 4668, 4673 (1980).

Many regulatory schemes, at all levels of government, exist without criminal sanctions for enforcement purposes. New Mexico itself relies in part on civil sanctions in its hunting and fishing enforcement scheme. *See, e.g.*, N.M. Stat. Ann. § 17-2-26 (1978). Although the Tribe may not assert criminal jurisdiction over non-members, the Supreme Court has at no time denied the power of an Indian tribe to assert its civil powers. For example, "[t]ribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65 (1978). *See also Williams v. Lee*, 358 U.S. 217 (1959). There is no inconsistency in the existence of tribal regulatory power without the availability of criminal sanctions. *Cf. United States v. Montana*, 604 F.2d 1162, 1165 (9th Cir. 1979), *cert. granted*, 48 U.S.L.W. 3661 (1980). Included in the Tribe's unquestioned authority is the power to expel those who violate tribal ordinances on the reservation. *See Quechan Tribe of Indians v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

(*footnote continued*)

Clara Pueblo v. Martinez 436 U.S. 49, 55-56 (1978); United States v. Wheeler, 435 U.S. 313, 322-28 (1978); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208 (1978); United States v. Antelope, 430 U.S. 641, 646 (1977); United States v. Mazurie, 419 U.S. 544, 557 (1975).

We reject the State's assertion that we must imply a divestiture of tribal sovereignty in any area in which the Tribe becomes involved with non-members. The Supreme Court has noted that "[t]he areas in which . . . implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and nonmembers of the tribe," *United States v. Wheeler*, 435 U.S. 313, 326 (1978), but the Court did not mean that sovereignty has necessarily been divested whenever a tribe's external relations are involved. The divestiture found in *Oliphant* is of a very special sort, and "[i]n most respects the *Oliphant* Court's rationale does not apply to noncriminal cases." Collins, *Implied Limitations on the Jurisdiction of Indian Tribes*, 54 Wash. L. Rev. 479, 508 (1979). *See* Note, *Balancing the Interests in Taxation of Non-Indian Activities on Indian Lands*, 64 Iowa L. Rev. 1459, 1467-69 (1979).

Even if tribal civil sanctions are not sufficient to provide efficient wildlife regulation, the criminal authority of the United States under 18 U.S.C. § 1165 could be interpreted broadly enough to fill much of any enforcement vacuum. When a non-member violates, for example, a tribal bag limit, he can be considered to have gone upon tribal land "without lawful authority or permission." His permission to enter was conditioned upon his observance of tribal game regulations.[21] The scienter element of the statute does not require for conviction that the offender

[21] This interpretation of § 1165 may differ in spirit from that of the Ninth Circuit: "[S]ection 1165 must be considered to be a statute providing a penalty for trespass to an Indian reservation and not an attempt by Congress to enter the field of fish and game regulation." United States v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976) (quoting State v. Danielson, 427 P.2d 689, 691 (Mont. 1967)). However, we do not believe that it differs in substantive result. It is sufficient for purposes of providing an enforcement mechanism that § 1165 be read merely as an anti-trespass statute.

intended to violate tribal lawful authority when he entered the land. The requirement is only that he "knowingly goes upon any land . . . for the purpose of hunting, trapping, or fishing thereon." If the statute does leave an enforcement vacuum, it would be for that very limited class which enters the reservation with no intent to participate in hunting, trapping or fishing and then violates the tribal game ordinances.

VI. Effect of Injunction

We must address one final question, an alleged lack of clarity in the district court's order. That ambiguity reflects, it is argued, the application of improper standards in granting injunctive relief. The State suggests that the district court's injunction provides incomplete relief to the Tribe because it expressly governs only "acts done on the Reservation" and does not address the State's claimed power to regulate *possession* of game off the reservation. Brief for Appellant at 23-24.

No dilemma exists. The simple answer is that, absent justification, the State may not discriminatorily prohibit possession of game lawfully obtained from the reservation while permitting possession of game obtained elsewhere. *See* N.M. Stat. Ann. § 17-2-7A(2) (1978). A proper game license from another state is presumably a defense to a New Mexico prosecution for possession of game without a New Mexico license. The same principle applies to game obtained on the reservation with a proper tribal license. Unless New Mexico is willing to prohibit possession of game altogether, it may not prohibit possession of game legally obtained from a source outside the State's jurisdiction. The Supreme Court has recently stressed that a state's historic interest in protection of wild animals, *see Geer v. Connecticut*, 161 U.S. 519 (1896), does not extend to

the "*ownership* of game that had been lawfully reduced to possession." *Hughes v. Oklahoma*, 441 U.S. 322, 327 (1979).

The district court's injunctive order properly protected its declaratory judgment.

AFFIRMED.

No. 78-1790—Mescalero Apache Tribe v. State of New Mexico

BREITENSTEIN, Circuit Judge, concurring in the result.

I concur in the result. In my opinion New Mexico may not enforce its fishing and hunting laws on the Mescalero Apache Reservation. The Tribe has the right of self-government. See Joe v. Marcum, 10 Cir., ____F.2d____, Nos. 78-1912 and 78-1932, opinion filed May 16, 1980. The control which the Tribe has exercised over fishing and hunting is reasonable. The Supreme Court has long been solicitous in its protection of the fishing and hunting rights of Indians. Cheyenne-Arapaho Tribes v. State of Oklahoma, 10 Cir., 618 F.2d 665, 669. Dual Tribe and State control may be appropriate as an aid in the conservation of fish and game. Id. at 667. The instant record shows no need for joint conservation measures. The right of the State to regulate off-reservation possession of game lawfully reduced to possession in accordance with Tribal law is foreclosed by Hughes v. Oklahoma, 441 U.S. 322, 327, 335-336.

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,
Plaintiff,

v.

No. 77-395-M
Civil

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of the New
Mexico Department of Game
and Fish, or his Successors
in Office,

Defendants.

JUDGMENT AND INJUNCTION

This case having come on for non-jury trial, the evidence having been heard and the arguments considered, a memorandum opinion has been entered which constitutes the findings of fact and conclusions of law; and having found the issues in favor of the plaintiff and having concluded that the plaintiff has made the requisite showing for issuance of an injunction against the defendants; Now, Therefore,

IT IS ORDERED that judgment is hereby entered against the defendants, and in favor of the plaintiff, the Mescalero Apache Tribe; and the hunting and fishing laws and regulations of the State of New Mexico are hereby declared inapplicable to any person, Indian or non-Indian, hunting or fishing within the exterior boundaries of the Mescalero Apache Reservation and jurisdiction to regulate

hunting and fishing within the Mescalero Apache Reservation is hereby declared to rest with the Mescalero Apache Tribe and the United States to the exclusion of the defendant the State of New Mexico; and

IT IS FURTHER ORDERED that the defendants or their agents are permanently enjoined from enforcing New Mexico hunting and fishing laws and regulations against any person either on the Reservation or after they have left the Reservation for acts done on the Reservation.

United States District Judge

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,
Plaintiff,

v.

No. 77-395-M
Civil

STATE OF NEW MEXICO and
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and as Director of the New
Mexico Department of Game
and Fish, or his Successors
in Office,

Defendants.

MEMORANDUM OPINION

The plaintiff, the Mescalero Apache Tribe, brought this action against the State of New Mexico for declaratory and injunctive relief. The plaintiff contends that the United States has authorized the Mescalero Apache Tribe exclusively to manage and to regulate the hunting and fishing resources on the Mescalero Apache Reservation and that the State of New Mexico is unlawfully infringing upon this exclusive jurisdiction, thereby violating the Tribe's right of self-government. The plaintiff seeks a judgment that New Mexico's hunting and fishing laws and regulations are inapplicable to any person, Indian or non-Indian, hunting or fishing within the exterior boundaries of the plaintiff's Reservation and that jurisdiction to regulate hunting and fishing within the Mescalero Apache Reservation rests with the Mescalero Apache Tribe and the United States to the exclusion of the defendant. The

plaintiff also seeks to permanently enjoin the defendant State from enforcing its hunting and fishing laws and regulations against any person, either on the Reservation or after they have left it, for acts done on the Reservation. The following will constitute my findings of fact and conclusions of law. I conclude in favor of the plaintiff.

The plaintiff invokes federal jurisdiction pursuant to 28 USC 1331 and 28 USC 1362. Jurisdiction is present. The defendant raises the issues of ripeness and standing. The defendant, in addition, argues that the United States and the Secretary of the Interior are indispensable parties to the plaintiff's action. There is no basis to these contentions.

A justiciable controversy exists here. Even though one hunting season has ended, another is imminent. State enforcement of its laws and regulations against persons hunting and fishing on the plaintiff's Reservation persists. In the defendant's proposed findings of fact, the defendant states: "The State of New Mexico has enforced and intends to continue to enforce its hunting and fishing laws and regulations against non-Indians hunting and fishing on Indian lands, including the Mescalero Apache Reservation." The case is not moot and the plaintiff has standing to litigate. The plaintiff alleges injury in fact and an interest within that zone of interests protected by the constitutional guarantee in question. See: *Assoc. of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970).

A determination that New Mexico game laws are not applicable to non-Indian activity within the Mescalero Apache Reservation cannot injuriously affect the interests of the United States and the plaintiff has a legal right to bring this action in its own behalf. Neither will a determination in this cause affect the Secretary of the Interior; no act would be required of the Secretary

regardless of the outcome of the suit. The defendant's contentions regarding indispensable parties, therefore, are without basis.

The parties have stipulated that the Mescalero Apache Tribe is a federally recognized Indian Tribe governed by its revised constitution of January 12, 1965, which was adopted pursuant to 25 USC 476. The governing body of the Mescalero Apache Tribe is duly recognized by the United States Secretary of Interior. The Tribe signed a treaty with the United States on July 1, 1852, which submitted the Tribe and its members to the laws, jurisdiction, and government of the United States of America. Article 9 of the Treaty provided that the United States government would designate, settle and adjust the boundaries of the Mescalero Apache lands. The Reservation of the Mescalero Apache Tribe was originally created by a Presidential Order in 1873, was modified by subsequent Executive Orders, and was established as it presently exists by an Executive Order dated March 24, 1883. The Reservation is located entirely within the State of New Mexico in the aboriginal territory of the Mescalero Apache.

Over the past several years the Mescalero Apache Tribe has developed an extensive tourism program designed to bring income and employment to the Reservation. As a part of that program and in order to better manage and control its wildlife resources the Tribe, pursuant to its constitution, has adopted hunting and fishing ordinances requiring tribal licenses, setting bag limits, and establishing programs and seasons for hunting and fishing on the Reservation. The Tribe's 1977 ordinances were duly approved by the Secretary of Interior. The Tribe benefits economically from hunting and fishing revenues. Fees from tribal licenses provide individual tribal members a wide range of governmental and social services. The Tribe employs seven full-time conservation

officers who assist a Bureau of Indian Affairs range conservationist with game management, aerial surveys, and pellet group transect studies to determine the deer, elk, antelope and bear populations on the Reservation.

In 1966 and 1967 the National Park Service donated an elk herd to be released on the Mescalero Apache Reservation. At that time it was estimated the elk in the general area of the Reservation numbered 13; the herd imported from Wyoming numbered 162. Although the antelope population on the Reservation is non-migratory, the elk range freely on and off the Mescalero Apache Reservation throughout the year. Since elk were planted in 1966, however, the Tribe has placed several wells in areas previously unable to support cattle because of absence of water. This considerable amount of range development has removed cattle from direct competition with elk in the higher parts of the Reservation. The Reservation is well suited to support elk as well as other game and the elk population in the area is now estimated at 1200.

The Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, operates a National Fish Hatchery on the Reservation and provides technical assistance in the management and development of fishery resources in Reservation waters. There are no natural lakes within the boundaries of the Reservation. Several man-made lakes have been constructed with federal funds and are stocked from the National Fish Hatchery.

Within the boundaries of the Mescalero Apache Reservation the State of New Mexico, in the last eight years, has not selected or improved any land or water areas as adaptable for wildlife feeding, resting or breeding places. The State has not adopted nor formulated any plans for restocking lakes and streams with fish, has not conducted research into problems of fish management or

administration of fish resources, and has undertaken no wildlife restoration projects. In short, the Tribe conducts its complete fish and game management program exclusive of the State of New Mexico.

The State, nevertheless, has been actively prosecuting non-Indians for violation of New Mexico hunting and fishing laws for acts committed within Reservation limits that did not violate tribal law. Section 53-2-31 N.M.S.A. 1953 Comp. states that the hunting and fishing laws of the State are applicable to "... all Indians off the reservation within the state or coming into the state from adjoining states, and to all persons hunting on any Indian reservation within the state..." except that no Indian is required to have a license to hunt or fish within the limits of the reservation where he resides. This conflicts with the law of the Tribe. Mescalero Apache Tribal Ordinance 77-1 provides: "No state license of any kind shall be necessary for any person." Other conflicts between State and Tribal regulations exist with regard to bag limits, fishing licenses, hunter training course requirements, and season dates. New Mexico 1978 Big Game Proclamation begins the antelope season on August 29, 1978; Tribal Ordinance 78-3 begins the antelope season on the Reservation on August 28, 1978. The State's hunting proclamation prohibits anyone who held an elk license in 1977 from applying again in 1978. The Tribe has no such restriction. The same New Mexico prohibition applies to antelope licenses, but the Tribe has no such restriction. Thus the present suit arises.

"As a basic proposition it is clear that Indians traditionally enjoyed the exclusive right to hunt and fish on lands reserved to them, unless such rights were clearly relinquished by treaty." *Confederated Tribes of the Colville Indian Reservation v. State of Washington*, 412 F. Supp. 651, 654 (1976). See also: *Menominee Tribe v. United States*, 391 U.S. 404 (1968). Thus before the Mescalero

Apache Tribe signed the Treaty of July 1, 1852, it had inherent and complete authority to control the fish and game found within the confines of the tribal territory. This right was part of the Indians' "larger rights" and was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States v. Winans*, 198 U.S. 371, 381 (1905). It was not surrendered by the Treaty of July 1, 1852. Even though the Treaty is silent as to hunting and fishing rights, it must be viewed as "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted." *Id.* A tribe reserves its right to control hunting and fishing in the area in which it resides whether or not such right is specifically mentioned in a treaty. *Menominee Tribe v. United States, supra.* Whether the reservation on which the right is to be exercised is created by Executive Order or by treaty makes no difference. *Antoine v. Washington*, 420 U.S. 194 (1975). A treaty is to be construed liberally and not to the prejudice of the Indians. *United States v. Winans, supra. Antoine v. Washington, supra. McClanahan v. Ariz. State Tax Commission*, 411 U.S. 164 (1973).

Aboriginal possession "creates a possessory right legally enforceable against everyone except the United States." *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 342 (1941). *United States v. Tillamooks*, 329 U.S. 40 (1946). Such right can be limited or abolished only by the United States. *Worchester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). *United States v. Mazurie*, 419 U.S. 544 (1975). Wilkinson and Volkman, "Judicial Review of Indian Treaty Abrogation: 'As Long As Water Flows, or Grass Grows Upon the Earth'—How Long a Time Is That?", 63 *Calif. Law Rev.* 601 (1975). No Presidential act and no federal legislation since 1852 has abrogated either the Treaty of July 1, 1852 or the Mescalero Apache Tribe's right to control hunting and fishing on its Reservation.

Whether the test for finding an abrogation of treaty rights is "a clear showing of legislative intent", "not lightly implied" or "express legislative reference" need not be decided. By any of these measures the Mescalero Apache Tribe has not lost its hunting and fishing rights.

This conclusion is reinforced by specific federal legislation, including 18 USC 1165. See: S. Rep. 1686, 86th Cong. 2d Sess. (1960). Section 1165 makes it a crime to go upon Indian lands for the purpose of hunting, trapping or fishing without permission of the tribe. The tribe decides who may and who may not hunt and fish within its reservation. This power is confirmed, as well, in the Indian Reorganization Act of 1934, 25 USC 461 et seq. Title 25 USC 1321, the successor to Public Law 280, gives some states limited jurisdiction over specified Indian affairs, but exempts "any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping or fishing or the control, licensing or regulating thereof." Public Law 280 is not applicable in New Mexico. Its language and that of Section 1321 (b), however, indicate a congressional policy to allow all Indian tribes self-government in specific areas including fish and game regulation and, in those states such as New Mexico which are not Public Law 280 states, to allow tribes self-government in other matters as well. Hence, in addition to aboriginal and treaty rights, Congress has clearly allowed Indian tribes, including the Mescalero, continued powers over reservation hunting and fishing.

Does this right exist in the tribe exclusively? The recent case of *White Mountain Apache Tribe v. State of Arizona*, No. 77-867 Civ., D. Ct. Ariz., Decided June 13, 1978, holds that it does not. Predicated on dual state-tribal jurisdiction over Indian lands and lack of specific legislative authority delegating to the White Mountain Apache Tribe power to preempt state fish and game laws,

the case concludes in favor of the State because "the overlapping jurisdiction of state and tribal law to non-Indian on-reservation hunting and fishing does not significantly infringe on a legitimate tribal interest in self-government."

The Court in *White Mountain Apache* finds that United States ownership of land within a state's boundaries does not withdraw the land from the jurisdiction of the state. I find, likewise, that the State of New Mexico has jurisdiction over some federal lands within its boundaries. But as to state jurisdiction there exists not one, but several different situations. Little similarity exists, for example, between the exercise of state jurisdiction on national forest lands and the exercise of state jurisdiction on military reservations. Federal jurisdiction over public lands "may range from exclusive federal jurisdiction with no residual state police power (cites omitted), to concurrent, or partial, federal legislative jurisdiction which may allow the State to exercise certain authority." *Kleppe v. State of New Mexico*, 426 U.S. 529, 542 (1976). Land owned by the United States cannot be considered as if it were of one kind only. To find, as the Court in *White Mountain Apache* does, that states have concurrent jurisdiction over all federal land within their boundaries is not consistent with the law I read on the subject. Such a general conclusion neglects to consider what is essential to the question of jurisdiction in Indian country: the Commerce Clause and the Supremacy Clause of the United States Constitution and a long line of federal Indian cases beginning with *Worcester v. Georgia, supra.*

The Constitution, Article I, Section 8, gives the Federal government plenary power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." *Worcester v. Georgia, supra*, examined the Commerce Clause and the basic relationships

among tribal, state and federal governments. *Worcester* held that the Constitution gives to the federal government plenary power to regulate Indian affairs and that, because Indian territory is territory distinct from that of a state, state laws do not apply within its boundaries. In one of many passages that remain a basis of contemporary Indian law, *Worcester* speaks of "the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent; that their territory was separated from that of any State, within whose chartered limits they might reside, by a boundary line, established by treaties; that the whole power of regulating the intercourse with them was vested in the United States." 8 Law. Ed. at 501.

No doubt *Worcester v. Georgia* has been modified. *Oliphant v. Suquamish Indian Tribe*, U.S. Supr. Ct. Slip Op. No. 76-5729, Decided March 6, 1978, qualified the scope of tribal powers by limiting tribal criminal jurisdiction. Yet the broad principles of *Worcester*, that the federal government has plenary authority in the regulation of Indian affairs and that Indian people are sovereign nations apart from the states, stand. *Williams v. Lee*, 358 U.S. 217, 219 (1959). "The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status." *United States v. Wheeler*, U.S. Supr. Ct. Slip Op. No. 76-1629, Decided March 22, 1978. See also: *McClanahan v. Arizona State Tax Commission*, *supra*.

The Court in *White Mountain Apache v. State of Arizona*, *supra*, purports to find, first, state authority to extend its police powers to affairs on Indian reservations, and then looks for legislative authority permitting the

Indian tribe to preempt this state law. I take a different approach. I conclude from the Constitution, the Treaty of July 1, 1852, and the case law that authority to regulate on the Mescalero Apache Reservation, or on any Indian reservation, rests entirely in the federal government and, although Congress can relinquish to the several states aspects of its jurisdiction over Indian affairs, the intent of Congress to give up any part of such authority must be clear. *Ex Parte Crow Dog*, 109 U.S. 556 (1883). *Bryan v. Itasca County*, 426 U.S. 373 (1976). It is legislation giving New Mexico authority to regulate on the Mescalero Apache Reservation that I must look for but do not find.

The defendant argues that because the State of New Mexico receives federal matching funds under the Pittman-Robertson Act, for wildlife management, and the Dingle-Johnson Act, for fish management, calculated by a method that includes the land area of the Mescalero Apache Reservation, Congress must be intending that the State of New Mexico exercise jurisdiction over the Reservation. The legislation in question does not meet the test of clear legislative intent. "Certain state laws have been permitted to apply to activities on Indian reservations *where those laws are specifically authorized by Acts of Congress*, or where they clearly do not interfere with federal policies concerning the reservations." *Warren Trading Post Co.* v. *Ariz. Tax Commission*, 380 U.S. 685, 687 (1965), emphasis added. The legislation cited by the defendant simply employs a formula adaptable to dissimilar situations, including those where an Indian reservation consents to a State's wildlife management scheme. In the instant case the Mescalero Apache Tribe conducts its own management program and enforces its own regulations; and the federal legislation in question is insufficient by itself to give the State of New Mexico authority to intervene.

I am not saying that it is 18 USC 1165 that prevents the defendant here, the State of New Mexico, from interfering with tribal fish and game regulation on the Mescalero Apache Reservation. In the case of *United States* v. *Sanford*, 547 F2d 1085 (9th C. 1976), the Court reasoned that 18 USC 1165 did not constitute an attempt by Congress to enter the field of fish and game regulation. The *Sanford* case held that Montana fish and game laws did apply on the Crow Indian Reservation. But the *Sanford* case and the present one differ significantly. I find with the Mescalero Apache Tribe a comprehensive fish and game policy together with an adequate and enforceable set of tribal ordinances. *United States* v. *Sanford, supra*, did not reach the question presented by the facts in the present case. In the absence of tribal ordinances, no law of the Crow Reservation conflicted with Montana law. In the absence of federal action regarding hunting and fishing on the Crow Reservation, Montana law could not be said to interfere with federal policies. Thus, despite specific authority, in the lack of conflict state law could be permitted to apply on the Reservation. I note, however, that the Court in *Sanford* stated: "We express no opinion concerning the possible concurrent application of tribal law to non-Indians on Indian reservations under the circumstances of this case", 547 F2d at 1089.

Reading *United States v. Sanford* with *United States v. Finch*, 548 F.2d 835 (9th C. 1977), I understand the Ninth Circuit to recognize those same Indian rights I have discussed and to consider 18 USC 1165 for the same purposes for which I have considered it. As the Court said in *Finch*, "The language and the history of 18 USC 1165 show that the right of Indians to control hunting, trapping and fishing on their lands is a prerogative of ownership which the United States recognizes as a matter of federal law." 548 F.2d at 834.

What I do believe prevents the exercise of state fish and game jurisdiction on the Mescalero Apache Reservation is federal preemption of the field. On July 1, 1852, the Mescalero Apache Tribe, in Article One of the Treaty, placed itself "exclusively under the laws, jurisdiction, and government of the United States." The New Mexico Enabling Act, 36 Stat. 557 (1910) states:

> All right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

The defendant maintains that absolute jurisdiction is not exclusive jurisdiction. Because of the Supremacy Clause of the United States Constitution, however, even in a field where a state might legislate, or where state law could be applied absent federal law in the area, a state's power is subordinate to federal law. Once Congress has chosen to adopt a comprehensive, integrated scheme of regulation in a given area, state action is precluded. *Hines v. Davidowitz*, 312 U.S. 52 (1940). *Warren Trading Post Co. v. Arizona Tax Commission*, *supra*.

White Mountain Apache Tribe v. State of Arizona, *supra*, rejected the preemption argument and used an infringement test analysis. The infringement test is clearly set out in *Williams v. Lee*, *supra*: "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." 358 U.S. at 220. The infringement test is coupled in *Williams v. Lee* with the preemption doctrine,

that is "absent governing Acts of Congress." Subsequent cases have never used the infringement test by itself; it is a concomitant consideration. *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

I understand that New Mexico's hunting and fishing laws are not enforced against members of the Mescalero Apache Tribe on their own Reservation and that no State officers go on the Mescalero Apache Reservation to enforce against non-Indians. Notwithstanding New Mexico's present enforcement policies, the Mescalero Apache Tribe is fully able to govern its own members. On the other hand, revenues from tribal hunting and fishing licenses greatly benefit the Mescalero Apache Tribe. The Tribe owns and operates a large hotel on its Reservation. Tourism is a major source of tribal income and revenues from tourists attracted by fishing and hunting on the Reservation contribute substantially to the Tribe's financial welfare. These facts are substantially the same as those in *Eastern Band of Cherokee Indians v. State of North Carolina Department of Natural and Economic Resources*, Civ. No. BC-C76-65, D. Ct. W.D. No. Carol., Decided August 27, 1976. In *Eastern Band of Cherokee Indians*, the United States, as in this case, had provided financial and technical assistance to a tribal wildlife program; the Tribe had enacted extensive regulations regarding hunting and fishing on the Reservation; the Tribe had a well-developed tourism program; and enforcement of the state's hunting and fishing laws, even as against non-Indians only, had a direct impact upon the revenues of the Tribe. Infringement was not the test relied on, however; the Court based its holding on preemption. "This Court finds and concludes that the federal government has assumed comprehensive supervision and management of trout fishing on the Reservation and has thereby preempted this field, and has delegated its regulatory power to the plaintiff, Eastern Band of Cherokee Indians. It therefore follows

that the State has no authority to levy and collect the fishing license fee." *Eastern Band of Cherokee Indians, supra*, cf. *Confederated Tribe of the Colville Indian Reservation v. State of Washington, supra*. Whether or not the defendant's actions in the present case, then, infringe on the self-government of the Mescalero Apache Tribe is not the principle consideration.

Confederated Tribes of the Colville Indian Reservation v. *State of Washington* is another case similar in facts to the one at hand. The Colville Indian Reservation was established by Executive Order on July 2, 1972. The Colville Indians have developed a program of sport fishing and tourism on the reservation and have been supported by the financial and technical assistance of the United States Fish and Wildlife Service. The Tribes have a set of fishing ordinances and regulations requiring tribal licenses but not a license from the State of Washington. When the State attempted to enforce its license requirement on non-Indians fishing within the boundaries of the Colville Reservation, the Tribes brought suit. The Court concluded that the Indians had fishing and hunting rights not relinquished by treaty, that although some tribal jurisdiction had been taken from the Tribes and given to the State of Washington by express provisions of Public Law 280, the Colville Indians had retained their jurisdiction over hunting and fishing, and that "Since plaintiff (tribes) has enacted a comprehensive program for the administration of tribal fisheries resources as authorized by the proviso of Section 1162(b), any state infringement of the tribes' exercise of this regulatory power would violate the Supremacy Clause." 412 F.Supp at 655. "Further, the exercise of such delegated powers has the same force and effect under the Supremacy Clause as if exercised by the federal government directly." *Id.*

United States v. *Mazurie, supra*, dealt with the delegation of Congressional authority to an Indian tribe. The

Wind River Tribes in Wyoming had adopted an ordinance which permitted liquor sales on the reservation, but which, in 1971, was amended to require both a state and a tribal license. In 1972, Mazurie applied for a tribal license and the license was denied. Mazurie continued his liquor sales without a tribal license until federal officers seized the alcoholic beverages and a criminal prosecution was initiated. The tribal court entered judgments of conviction; the Court of Appeals reversed on the grounds that the prosecution had failed to prove the bar was not excluded from "Indian country" under the exception for fee-patented lands and that the tribal ordinance was an invalid delegation of Congressional authority. The Supreme Court held, as to the second ground, that the delegation of federal authority to the Indian tribe was proper. The Court stated at 556-557:

> This Court has recognized limits on the authority of Congress to delegate its legislative power. (Cite omitted.) Those limitations are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter. (Cite omitted.) Thus it is an important aspect of this case that Indian tribes are unique aggregations possessing attributes of Sovereignty over both their members and their territory, *Worcester* v. *Georgia*, 6 Pet. 515, 557 (1832); they are "a separate people" possessing "the power of regulating their internal and social relations . . . ," *United States* v. *Kagama*, 118 U.S. 375, 381-382 (1886); *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 173 (1973).

The fish and game ordinances and regulations of the Mescalero Apache Tribe, therefore, authorized and sanctioned by the federal government and accompanied by active federal support of the fish and game program on

the Mescalero Reservation, provide the integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation. The United States had acted in the exercise of its fiduciary duty to an Indian tribe. It has, additionally, permitted tribal regulations reaching non-Indians that, had it wanted, the federal government itself could have enacted. As stated in *Eastern Band of Cherokee Indians, supra:*

> . . . these governmental acts, under congressional authority and approval, relate to the exercise of guardianship and protection over the Eastern Band and . . . such acts reasonably relate to the Tribe's economic welfare. It is a valid governmental function consistent with its fiduciary relationship with the Tribe, and under the facts of this case, preempt the State's regulation. It follows that the United States, in conjunction with the Eastern Band, is entitled to regulate and maintain the fish management program on the Cherokee Reservation with the interference of the State.

Coupled with the federal policy of Indian self-determination, all of these considerations lead me to the conclusion that the combined actions of the United States and the Mescalero Apache Tribe establish in the United States and the Mescalero Apache Tribe an exclusive jurisdiction over hunting and fishing on the Mescalero Apache Reservation and prevent the State of New Mexico from enforcing its fish and game laws and regulations against any person, Indian or non-Indian, for acts committed within the boundaries of the Reservation.

The record indicates that the defendants or their agents might continue enforcement of New Mexico hunting and fishing laws against persons hunting and fishing on the Mescalero Apache Reservation and that if this

occurred the plaintiff would suffer irreparable harm and stand without a remedy at law. I conclude that a permanent injunction against the defendant is warranted. A judgment and injunction will be entered consistent with this opinion.

UNITED STATES DISTRICT JUDGE

Treaty With The Apaches, July 1, 1852, 10 Stat. 979 (1852)

Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power they do hereby submit.

Article 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's [sic] that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

The New Mexico Enabling Act, 36 Stat. 557 (1910)

All right and title . . . to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States.

Indian Reorganization Act of 1934, 25 U.S.C. § 476

§ 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revokable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

Public Law 83-280, as amended, 18 U.S.C. § 1162(b)

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

Supreme Court, U.S.
FILED
JAN 13 1983
ALEXANDER L. STEVAS
CLERK

No. 82-331

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEW MEXICO and HAROLD F. OLSON
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 25, 1982
CERTIORARI GRANTED NOVEMBER 15, 1982

IN THE

Supreme Court of the United States

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I. United States District Court for the District of New Mexico

July 7, 1977—Complaint for declaratory and injunctive relief and application for preliminary injunction filed in the United States District Court for the District of New Mexico.

August 19, 1977—Hearing on Plaintiff's motion for preliminary injunction.

August 25, 1977—Preliminary injunction issued enjoining State of New Mexico from prosecuting any non-Indians for hunting, possessing, or transporting antelope taken on the Mescalero Reservation so long as individual has both a tribal and a state antelope license and denying motion for preliminary injunction in all other respects.

October 13, 1977—Defendants' answer with affirmative defenses filed.

November 21, 1977—Plaintiff's supplemental complaint for declaratory judgment and injunctive relief filed.

December 16, 1977—Defendants' answer to supplemental complaint filed.

April 21, 1978—Stipulation by parties for purpose of introduction in evidence.

April 25, 1978—Non-jury trial.

August 2, 1978—Issuance of judgment for Plaintiff declaring that hunting and fishing laws and regulations of the State of New Mexico are inapplicable to any person, Indian or non-Indian, hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation and that jurisdiction to regulate hunting and fishing within the Reservation rests with the Mescalero Apache Tribe and the United States to the exclusion of the State of New Mexico and permanently enjoining Defendants from enforcing New Mexico hunting

and fishing laws against any person either on the Reservation or after the person has left the Reservation for acts done on the Reservation.

August 30, 1978—Defendants' notice of appeal filed.

II. United States Court of Appeals for the Tenth Circuit, No. 78-1790

September 29, 1978—Case docketed.

October 11, 1978—Certified record filed.

November 6, 1978—Docket statement filed.

March 30, 1978—Appellants' brief filed.

June 7, 1979—Appellees' answer brief filed.

August 9, 1979—Appellants' reply brief filed.

October 17, 1979—Oral argument.

August 13, 1980—Opinion and judgment issued.

September 4, 1980—Mandate issued.

April 6, 1981—Writ of certiorari issued by United States Supreme Court vacating judgment issued by United States Court of Appeals for Tenth Circuit on August 13, 1980 and remanding for further consideration.

May 12, 1981—Judgment issued on August 13, 1980 vacated and mandate issued on September 4, 1980 recalled by U.S. Court of Appeals for the Tenth Circuit.

June 29, 1981—Supplemental briefs on remand ordered.

August 18, 1981—Supplemental brief in chief filed.

September 8, 1981—Supplemental answer brief filed.

October 15, 1981—Supplemental reply brief filed.

April 26, 1982—Opinion and judgment on remand issued.

May 18, 1982—Mandate on remand issued.

III. Supreme Court of the United States

November 12, 1980—Petition for writ of certiorari filed by State of New Mexico.

December 11, 1980—Brief in opposition to petition for writ of certiorari filed by Mescalero Apache Tribe.

April 6, 1981—Order granting petition for certiorari, vacating decision of United States Court of Appeals for Tenth Circuit dated August 13, 1980, and remanding case to that court for further consideration in light of *Montana v. United States*, 450 U.S. 544 (1981).

August 25, 1982—Petition for writ of certiorari filed by State of New Mexico following judgment on remand issued by United States Court of Appeals for Tenth Circuit.

September 27, 1982—Brief of amici curiae States of Utah, Arizona, California, Montana, Nevada, South Dakota, Washington and Wyoming in support of petition for writ of certiorari.

October 14, 1982—Brief in opposition to petition for writ of certiorari filed by Mescalero Apache Tribe.

November 15, 1982—Order granting petition for writ of certiorari issued.

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

MESCALERO APACHE TRIBE,
Plaintiff,

vs

STATE OF NEW MEXICO and
WILLIAM S. HUEY,
Individually and as Director of the New Mexico
Department of Game and Fish, or his Successors in Office.
Defendants.

No. CIV 77-395

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Filed July 7, 1977)

1. This is an action for declaratory and injunctive relief pursuant to 28 U.S.C. 2201 and 2202 in which the Mescalero Apache Tribe (Tribe) seeks a judgment from this court declaring that New Mexico's hunting and fishing laws and regulations are inapplicable to any person, Indian or non-Indian, hunting or fishing within the exterior boundaries of the Tribe's Reservation and that jurisdiction to regulate hunting and fishing within the Mescalero Apache Reservation rests with the Mescalero Apache Tribe and the United States to the exclusion of Defendants. The Tribe also seeks preliminary and permanent injunctive relief enjoining Defendants or their agents from enforcing New Mexico's hunting and fishing laws and regulations against any person either on the Reservation or after they have left the Reservation for acts done on the Reservation.

2. This court has jurisdiction pursuant to 28 U.S.C. 1331 and 1362 as the action is brought by a Tribe having a governing body duly recognized by the Secretary of the Interior; the matter in controversy exceeds the sum of $10,000.00 exclusive of interest and costs and arises under the Constitution, laws and treaties of the United States.

3. The Mescalero Apache Tribe is an Indian Tribe recognized by the Treaty of July 1, 1852, 10 Stat. 979, which places them exclusively under the laws, jurisdiction and government of the United States of America.

4. Article 9 of the Treaty of July 1, 1852 provided that the United States government would designate, settle and adjust the boundaries of the signatories to the Treaty and thereafter the Mescalero Apache Reservation was created by a series of Executive Orders beginning in 1873.

5. The Mescalero Apache Tribe is governed by its Revised Constitution of January 12, 1965, which was adopted pursuant to 25 U.S.C. 476, a section of the Indian Reorganization Act of 1934. The governing body is duly recognized by the Secretary of the Interior as shown by his approval of the Revised Constitution. A copy of this Constitution is attached as Exhibit "A" and is incorporated by reference.

6. Defendant, William S. Huey, is Director of the New Mexico Department of Game and Fish and is the chief state officer responsible for the enforcement of New Mexico's hunting and fishing laws and regulations.

7. Pursuant to Article IX, Section 1(c) of the Tribe's Revised Constitution, the Tribal Council has adopted a hunting and fishing ordinance governing all persons, Indian and non-Indian, hunting and fishing on the Reservation. The Tribal Council has also adopted a resolution specifically for the 1977 hunting and fishing seasons which spells out in detail the rules and regulations governing hunting and fishing on the Reservation for that particular year. Neither Tribal Council enactment requires a state license for hunting or fishing within the Reservation. Copies of these enactments are attached hereto as Exhibits "B" and "C" and incorporated herein by reference.

8. An elk herd numbering 162 elk was released on the Mescalero Apache Reservation in 1966-67. This came about through a joint effort of the Mescalero Apache Tribe and Bureau of Indian Affairs after an elk habitat reconnaissance had been made. The state of New Mexico did not participate in any manner in this endeavor.

9. Eighty-five per cent or more of the elk herd maintain themselves permanently within the exterior boundaries of the Mescalero Apache Reservation. The remaining fifteen per cent occasionally spent short periods of time in the White Mountain Wilderness Area or the Lincoln National Forest. The elk seldom if ever leave tribal or federal land.

10. The antelope population within the Reservation is non-migratory and these animals seldom if ever leave the exterior boundaries of the Mescalero Reservation.

11. The Mescalero Apache Tribe employs seven full-time tribal conservation officers who work in conjunction with the Bureau of Indian Affairs to assure conservation of fish and game within the Reservation.

12. Tribal conservation officers and BIA officers jointly conduct annual aerial surveys of deer and elk population and semi-annual aerial studies of the antelope population. In addition, pellet group transect studies are conducted twice a year to show the trend in deer and elk population. Bear population is estimated on the number of group sightings. As a result of these studies, Tribal and BIA conservation officials make yearly recommendations to the Tribal Council as to appropriate seasons and game limits consistent with conservation of the reservation wildlife.

13. Tribal conservation officers work in close cooperation with the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior in stocking the waters of the Reservation with fish and the Tribal conservation officers make recommendations on fishing seasons and limits to the Tribal Council to insure conservation. The State of New Mexico does not stock any lakes or streams within the Mescalero Apache Reservation.

14. The state of New Mexico plays no role in the conservation of fish and game within the Mescalero Apache Reservation.

15. Bag limits and hunting and fishing seasons within the exterior boundaries of the Mescalero Reservation do not coincide with those set forth in the state of New Mexico's hunting and fishing regulations.

16. 53-2-31 NMSA provides that New Mexico's hunting and fishing regulations are applicable to " . . . Indians coming into New Mexico from other states and to all persons hunting on any Indian reservation within this state . . . " except that no Indian is required to have a license to hunt or fish within the limits of the reservation where he resides. Other than the exception mentioned, the state of New Mexico purports to require all persons hunting or fishing within the Mescalero Apache Reservation to obtain state hunting and/or fishing licenses.

17. On September 23 through 26, 1977, two non-Indians, James Oliver and Sherman Shaw, each possessing tribal licenses only, participated in an elk hunt on the Reservation and each killed an elk.

18. Messrs. Shaw and Oliver each placed their elk in the care of Assorted Tracks Corporation of America, (Assorted Tracks), a taxidermy and meat processing organization, doing business in Dallas County, Texas. Mescalero tags were attached to the animals, but no state tags.

19. Assorted Tracks took the meat, antlers and capes to Garland, Texas, to have the meat processed, and prepared the remainder for taxidermy work. The cape and hide belonging to Sherman Shaw were picked up by one of Shaw's employees on October 28, 1976.

20. On November 2, 1976, Keith McCartney, Special Agent for the Department of Interior, United States Fish and Wildlife Service, Fort Worth, Texas, entered Assorted Tracks' Garland facility and placed the antlers and cape belonging to James Oliver under seizure notice. Upon information and

belief, this was done at the request of the New Mexico Department of Game and Fish.

21. Criminal charges were brought against both Oliver and Shaw in Magistrate Court in Otero County, New Mexico, and both parties paid a $600.00 fine.

22. New Mexico officials intend to continue to enforce state hunting and fishing regulations against persons hunting and/or fishing with tribal authorization within the exterior boundaries of the Mescalero Apache Reservation.

23. The Mescalero Apache Tribe and its members derive substantial economic benefit from persons hunting and fishing on the Reservation. In 1976 such benefits were in excess of $100,000.00. Some of this income goes to the Tribe and is used for the administration of tribal resource programs and to provide governmental and social services for the members of the Tribe. The remainder goes directly to members of the Tribe for services rendered to hunters.

24. Enforcement of New Mexico's hunting and fishing laws and regulations against persons hunting and fishing within the Reservation threatens to destroy the entire hunting and fishing program of the Tribe to the severe economic detriment of the Tribe and its members, as the general public fears state prosecution for actions fully authorized by the appropriate tribal authorities. State action such as that against Shaw and Oliver destroys the goodwill the Tribe has developed and which is so essential to the Tribe's overall development of tourism on the Reservation.

25. The state of New Mexico publishes literature for use of the general public which states that state hunting and fishing licenses are required for hunting and fishing on Indian reservations within the state and this significantly discourages non-Indians from hunting and fishing on the Mescalero Apache Reservation because they must either buy two sets of licenses or risk arrest upon leaving the Mescalero Apache Reservation. As a result, the Mescalero Apache Tribe loses badly needed tribal revenues required to support its wildlife program and other governmental services.

26. Enforcement of New Mexico's hunting and fishing laws and regulations against persons hunting and fishing on the Mescalero Reservation infringes on the sovereignty and self-government of the Mescalero Apache Tribe and threatens to undermine tribal authority.

27. The new hunting and fishing seasons are fast approaching and unless a preliminary injunction is issued pending final determination in this action, and upon final hearing, a permanent injunction, enjoining Defendants and their agents, servants or others acting in consort with them from enforcing New Mexico game and fish laws and regulations against persons either while on the Reservation or after they have left the Reservation, for activities within the Reservation, and further enjoining them from communicating to the public that state licenses are needed for hunting and fishing within the Mescalero Apache Reservation, the Mescalero Apache Tribe will suffer irreparable injury in excess of $10,000.00 exclusive of interest and costs in that its hunting and fishing program will suffer irretrievable setbacks causing economic loss to the Tribe and its members; the Tribe will suffer irretrievable loss of goodwill upon which its entire tourism program depends and tribal governmental authority will be seriously undermined.

28. The past and threatened acts of Defendants in conflict with:

(a) The Treaty of July 1, 1852 between the United States and the Apache Nation, 10 Stat. 979;

(b) 18 U.S.C. 1165 and the Tribe's Hunting and Fishing Ordinances;

(c) The New Mexico Enabling Act, 36 Stat. 557, and Article XXI, Sec. 2 of the New Mexico Constitution;

(d) Art. 1. Sec. 8. cl. 3 of the United States Constitution;

(e) Federal Common Law limiting state infringement on tribal sovereignty;

(f) Federal policy of Indian self-determination as expressed in the Indian Reorganization Act and other federal laws.

(g) 25 U.S.C. 1321, 1322, 1326 relating to procedures for state assumption of jurisdiction over Indian reservations.

WHEREFORE, Plaintiff prays that this Court issue a declaratory judgment declaring that:

(a) The hunting laws and regulations of the state of New Mexico are not applicable to persons hunting or fishing on the Mescalero Apache Reservation, either while on the Reservation or after they leave the Reservation as to acts performed on the Reservation;

(b) That the regulation of hunting and fishing within the Reservation is in the hands of the federal and tribal governments to the exclusion of the State of New Mexico;

(c) That an attempt to enforce New Mexico hunting and fishing regulations against persons hunting and fishing on the Reservation would violate the Treaty of July 1, 1852 between the United States and the Apache Nation, 10 Stat. 979, 18 U.S.C. 1165 and the Tribe's hunting and fishing ordinance; the New Mexico Enabling Act and Article 21, Section 2 of the New Mexico Constitution; Article 1, Section 8, Clause 3 of the United States Constitution; Federal Common Law limiting state infringment of tribal sovereignty; Federal policy of Indian self-determination as expressed in the Indian Reorganization Act and other federal laws; 25 USC 1321, 1322, and 1326 relating to procedures for state assumption of jurisdiction over Indian reservations;

(d) Defendants should be preliminarily and permanently enjoined from attempting to enforce New Mexico's hunting and fishing laws against persons hunting and fishing on the Reservation or after they leave the Reservation for acts done on the Reservation and they should further be enjoined from in any way communicating to the public that state hunting and fishing licenses are needed within the Mescalero Apache Reservation.

FETTINGER AND BLOOM

By /s/ GEORGE E. FETTINGER
George E. Fettinger

/s/ NORMAN D. BLOOM, JR.
Norman D. Bloom, Jr.

/s/ KIM J. GOTTSCHALK
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Alamogordo, New Mexico 88310

(Subscription Omitted in Printing)

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

APPLICATION FOR PRELIMINARY INJUNCTION AND REQUEST FOR EVIDENTIARY HEARING (filed July, 1977)

The Mescalero Apache Tribe requests this Court to issue a Preliminary Injunction enjoining the State of New Mexico and William S. Huey, Director of the New Mexico Department of Fish and Game as follows:

1. From attempting to enforce New Mexico's hunting and fishing laws and regulations against persons hunting and fishing on the Mescalero Reservation;

2. From enforcing said laws or regulations against persons after they leave the Reservation for acts performed on the Reservation;

3. From communicating to the public in any way that state licenses are required for hunting or fishing within the Mescalero Apache Reservation.

The grounds of this application are as follows:

1. The State of New Mexico recently prosecuted two non-Indians for hunting within the exterior boundaries of the Mescalero Apache Reservation without a state license even though they had Tribal authority to hunt. The state also caused a federal agent to confiscate the trophies taken by the hunters.

2. Literature put out by the New Mexico Department of Game and Fish represents to the public that state hunting and fishing licenses are necessary for hunting and fishing within the Mescalero Apache Reservation.

3. If allowed to continue, this action by the State of New Mexico will cause irreparable direct and indirect economic harm to the Mescalero Apache Tribe through loss of revenue from the sale of licenses and guide services as well as loss of revenue at the Inn of the Mountain Gods. Such action will also cause the Tribe to lose goodwill and thereby suffer irreparable injury to its tourism program. The Tribe will also suffer continued infringement of its tribal sovereignty.

The Tribe has not had contact with Defendants or their attorneys, but presumes they would object to this application and requests a hearing to be held thereon.

The Tribe requests an evidentiary hearing with oral argument on this application.

FETTINGER AND BLOOM

By /s/ NORMAN D. BLOOM, JR.

Post Office Drawer M
Alamogordo, New Mexico 88310

Attorneys for Mescalero Apache Tribe

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

PRELIMINARY INJUNCTION

(filed August 25, 1977)

This case came on to consider plaintiff's application for a preliminary injunction.

This is an action for declaratory and injunctive relief; the question to be resolved is whether the Mescalero Apache Tribe has sole authority to regulate hunting and fishing by Indians and non-Indians within the exterior boundaries of the reservation. The State contends that it has the power to regulate hunting and fishing by non-Indians and to require state licenses to hunt on reservation lands. The State recognizes the right of the Tribe to co-regulate hunting on the reservation by requiring a Tribal license and imposing other conditions on the entry of its land. The State's theory of its power to regulate hunting is the system which has been in effect since 1972 to the present.

The Mescalero Tribal Council has set harvest limits and authorizes the sale of permits. In the past years the Tribe has sold nearly all permits authorized producing substantial revenue for the Tribe. It appears that the Tribe's change of position that no New Mexico license is required, coupled with notice that it will not be responsible for any consequences suffered by a hunter who fails to obtain a State license, has not deterred hunters from buying Mescalero permits for the coming season.

There is, however, one area of direct conflict. The Tribe has set August 29 to September 2 as its first antelope season and

has authorized ten permits. The State's season begins September 1. Formerly other hunt dates have coincided as a result of State and Tribal cooperation. This year, however, any non-Indian desiring to hunt antelope on the reservation cannot do so without violating the New Mexico Game laws. The Tribe's difference in selection of dates is based on the availability of personnel for hunting and non-hunting duties.

Except for the antelope hunt, the evidence fails to show any indication of irreparable harm to warrant an injunction. Further, the injunction sought by the Tribe is not one to preserve the status quo, but to change it prior to hearing the action on the merits.

An injunction is hereby entered enjoining the State of New Mexico from prosecuting any non-Mescalero for hunting, possessing or transporting antelope taken on the Mescalero Reservation so long as the individual has obtained both a tribal permit for the Mescalero season and a State antelope license for the applicable season set forth in the state hunting proclamation. This injunction will be vacated if the State Game Commission amends its antelope season to coincide with the Tribe's season, adequately notifies hunters of the change and makes permits available.

IT IS FURTHER ORDERED in all other respects the motion for a preliminary injunction is denied.

/s/

UNITED STATES DISTRICT JUDGE

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

ANSWER

Comes now Defendants, State of New Mexico and William S. Huey, by and through counsel, and as their Answer to the Complaint filed in this cause state that.

FIRST DEFENSE

1. Defendants admit the allegations contained in Paragraph 1 of the Complaint, but Defendants deny the propriety of the relief sought by the Plaintiff.

2. Defendants deny the allegations contained in Paragraphs 2, 3 and 4 of the Complaint.

3. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint and therefore Defendants deny such allegations.

4. Defendants admit the allegations contained in Paragraph 6 of the Complaint.

5. Defendants deny the allegations contained in Paragraph 7 of the Complaint.

6. Defendants admit that approximately 162 elk were released on the Mescalero Apache Reservation in 1966-67, but Defendants deny all other allegations contained in Paragraph 8 of the Complaint.

7. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 9 of the Complaint and therefore Defendants deny such allegations.

8. Defendants admit the allegations contained in Paragraph 10 of the Complaint.

9. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint and therefore Defendants deny such allegations.

10. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint and therefore Defendants deny such allegations.

11. Defendants admit that the Bureau of Sport Fisheries and Wildlife of the United States Department of the Interior stock some of the waters on the Mescalero Reservation with fish, but Defendants deny all other allegations contained in Paragraph 13 of the Complaint.

12. Defendants deny the allegations contained in Paragraph 14 of the Complaint.

13. Defendants admit the possibility that some New Mexico fishing bag limits may not coincide with those set forth in Mescalero Apache Tribe Ordinance No. 77-2, but Defendants deny all other allegations contained in Paragraph 15 of the Complaint.

14. Defendants admit the allegations contained in Paragraph 16 of the Complaint.

15. Defendants admit the allegations contained in Paragraph 17 of the Complaint with the exception that the figure 1977 should be 1976.

16. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 18, 19 and 20 of the Complaint and therefore Defendants deny such allegations.

17. Defendants admit the allegations contained in Paragraphs 21 and 22 of the Complaint.

18. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraph 23 of the Complaint and therefore Defendants deny such allegations.

19. Defendants deny the allegations contained in Paragraph 24 of the Complaint.

20. Defendants admit that they publish hunting and fishing literature for the benefit of the public, but Defendants deny all other allegations contained in Paragraph 25 of the Complaint.

21. Defendants deny the allegations contained in Paragraph 26 of the Complaint.

22. Defendants deny the allegations contained in Paragraph 27 of the Complaint.

23. Defendants deny the allegations contained in Paragraph 28 of the Complaint.

SECOND DEFENSE

The Complaint fails to establish a justiciable case or controversy between the Plaintiff and the Defendants.

THIRD DEFENSE

The Plaintiff lacks standing to maintain this action against the Defendants.

FOURTH DEFENSE

The United States is an indispensible party to this action.

FIFTH DEFENSE

The Secretary of the Interior of the United States and his designated representatives as guardian of the Plaintiff are indispensible parties to this action.

SIXTH DEFENSE

The claims asserted in this action are barred by laches.

SEVENTH DEFENSE

This Court lacks jurisdiction over the subject matter of this action.

EIGHTH DEFENSE

This Court should abstain from considering the claims asserted in this action.

NINTH DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the Defendants pray that the Court deny the relief requested, dismiss the Complaint, and grant such other and further relief as the Court may deem proper.

/s/ TONEY ANAYA

Toney Anaya
Attorney General

/s/ THOMAS L. DUNIGAN

Thomas L. Dunigan
Deputy Attorney General

/s/ ALBERT L. PITTS

Albert L. Pitts
Assistant Attorney General

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted In Printing)

SUPPLEMENTAL COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

COMES NOW the Plaintiff, by and through its attorneys, the law firm of Fettinger and Bloom of Alamogordo, New Mexico, and as its supplemental complaint pursuant to 15(d) Federal Rules of Civil Procedure, additionally adds to its complaint and states as follows:

1. After the filing of Plaintiff's complaint and after the court order of August 25, 1977, two non-Indians, Jeff Crumley and Gene Moretz, participated in an elk hunt on the Mescalero Apache Reservation during the dates of September 30 through October 5, 1977.

2. Jeff Crumley possessed a tribal bear and elk hunting license and a New Mexico bear and elk hunting license number 116 and Mr. Crumley killed an elk. Mr. Gene Moretz possessed a tribal bear and elk hunting license, but did not possess a New Mexico bear and elk hunting license and did not kill an elk or a bear.

3. Messrs. Crumley and Moretz, upon leaving the Mescalero Apache Reservation, were stopped twice by New Mexico Game and Fish Officers; once at Ruidoso, New Mexico, and again at Roswell, New Mexico.

4. When stopped at Roswell, New Mexico, Ron Porter, Wildlife Enforcement Specialist for the State of New Mexico, informed Messrs. Crumley and Moretz that unless they gave

him a recorded statement they would be issued citations carrying a $1,000.00 fine.

5. Messrs. Crumley and Moretz were detained and taken before a tape recorder and questioned in regard to their hunting on the Mescalero Apache Reservation.

6. Upon seeking New Mexico bear and elk hunting licenses at the Gibson Store, Ruidoso, New Mexico, prior to hunting on the Mescalero Apache Reservation, the vendor or salesman told Messrs. Crumley and Moretz not to purchase New Mexico state licenses until after the kill was made.

7. The state action of deliberate misrepresentation and harassment such as that against Messrs. Crumley and Moretz was done to purposely harass and embarass Plaintiff and to destroy the goodwill the Tribe has developed that is so essential to the Tribe's overall development of tourism on the Reservation.

8. On October 6, 1977, two employees of the Mescalero Apache Tribe John F. Frye, and Reese Tatum, while operating a Ryder Rental Truck, were carrying packaged and frozen elk meat from the Mescalero Apache Reservation to El Paso, Texas, to air express the meat to the various persons who had taken elk on the Mescalero Apache Reservation.

9. Approximately 15 miles south of Alamogordo, New Mexico, the truck being driven by Reese Tatum accompanied by John F. Frye, was stopped for excessive speed by a New Mexico State police officer.

10. Frye and Tatum were asked if they were carrying elk meat, and answered yes; the police officer asked to look into the closed trunk and permission was granted.

11. Upon seeing the packages, the officer searched the person of both Frye and Tatum; took Frye into custody and ordered Tatum to drive the vehicle back to Alamogordo, New Mexico.

12. Upon arrival in Alamogordo, New Mexico, Officer Tim Barraclough of the New Mexico Fish and Game Department started to search the vehicle when consent to search was

withdrawn by the attorney for the Plaintiff, when Officer Barraclough would not disclose the reasons for this entire episode.

13. Traffic citation for speeding in New Mexico is not an offence that requires arrest when the violator agrees to appear before a magistrate or alternatively agrees to mail in a specified fine for the offense.

14. No traffic citation was issued to the driver, Tatum, until two hours after his arrival back at Alamogordo, New Mexico.

15. At no time during the arrest, detention and return to Alomogordo, New Mexico, were either Frye or Tatum informed what was being sought by the New Mexico State Police or the New Mexico Game and Fish Department or for what they were being detained and returned to Alamogordo, New Mexico, until after consent to search the vehicle had been withdrawn by Plaintiff's attorney.

16. The unlawful arrest, detention and attempted search of tribal employees and of the vehicle were all conducted at the behest of the New Mexico Fish and Game Department without probable cause that a crime had been committed or upon which to obtain a search warrant, all in violation of the United States Constitution and the Constitution of the State of New Mexico prohibiting unreasonable arrest and unreasonable search and seizure.

17. This was but another attempt on the part of the New Mexico Fish and Game Department to deliberately harass, embarass and destroy the Plaintiff's development of tourism on the Mescalero Apache Reservation.

WHEREFORE, Plaintiff prays this Court to additionally permanently enjoin the Defendant against any further harassment of Plaintiff, Plaintiff's employees and Plaintiff's guests in the attempt to enforce the state game laws and regulations of the State of New Mexico against Plaintiff.

FETTINGER AND BLOOM

By /s/ NORMAN D. BLOOM, JR.

Norman D. Bloom, Jr.
Post Office Drawer M
Alamogordo, New Mexico 88310

Attorneys for Plaintiff

IN THE

United States District Court

DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

ANSWER TO SUPPLEMENTAL COMPLAINT
(Filed December 16, 1977)

COMES NOW Defendants, State of New Mexico and William S. Huey, by and through counsel, and as their Answer to the Supplemental Complaint pursuant to Rule 15(d), Federal Rules of Civil Procedure, filed in this cause further state that:

FIRST DEFENSE

1. Defendants admit that two non-Indians, Jeff Crumley and Gene Moretz, participated in an elk hunt on the Mescalero Apache Reservation, but Defendants lack sufficient information to form a belief as to the truth of the other allegations contained in Paragraph 1 of the Supplemental Complaint and therefore Defendants deny such allegations.

2. Defendants admit that Jeff Crumley possessed a New Mexico elk hunting license number 116 and killed an elk, but lack sufficient information to form a belief as to the truth of all other allegations contained in Paragraph 2 of the Supplemental Complaint and therefore Defendants deny such allegations.

3. Defendants deny the allegations contained in Paragraphs 3, 4, 5, 6 and 7 of the Supplemental Complaint.

4. Defendants admit that on October 6, 1977 John F. Frye and Reese Tatum were transporting packaged and frozen elk meat from the Mescalero Apache Reservation in a Ryder Rental Truck, but Defendants lack sufficient information to form a belief as to the truth of all other allegations in

Paragraph 8 of the Supplemental Complaint and therefore Defendants deny such allegations.

5. Defendants admit the allegations contained in Paragraphs 9 and 10 of the supplemental Complaint.

6. Defendants deny the allegations contained in Paragraphs 11 and 12 of the Supplemental Complaint.

7. Defendants admit the allegations contained in Paragraph 13 of the Supplemental Complaint.

8. Defendants lack sufficient information to form a belief as to the truth of the allegations contained in Paragraphs 14 and 15 of the Supplemental Complaint and therefore Defendants deny such allegations.

9. Defendants deny the allegations contained in Paragraphs 16 and 17 of the Supplemental Complaint.

SECOND DEFENSE

The Supplemental Complaint fails to establish a justiciable case or controversy between the Plaintiff and the Defendants.

THIRD DEFENSE

The Plaintiff lacks standing to maintain this action against the Defendants.

FOURTH DEFENSE

The United States is an indispensible party to this action.

FIFTH DEFENSE

The Secretary of the Interior of the United States and his designated representatives as guardian of the Plaintiff are indispensible parties to this action.

SIXTH DEFENSE

The Courts lacks jurisdiction over the subject matter of this action.

SEVENTH DEFENSE

The Supplemental Complaint fails to state a claim upon which relief can be granted.

WHEREFORE, the Defendants pray that the Court deny the relief requested, dismiss the Complaint and grant such other and further relief as the Court may deem proper.

/s/ TONEY ANAYA LTD.

Toney Anaya
Attorney General

/s/ THOMAS L. DUNIGAN

Deputy Attorney General

/s/ ALBERT L. PITTS

Albert L. Pitts
Assistant Attorney General

Bataan Memorial Building
P.O. Drawer 1508
Santa Fe, N.M. 87503

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

(Caption Omitted in Printing)

DEFENDANTS' REPLY TO PLAINTIFF'S REQUEST FOR ADMISSIONS

Pursuant to Rule 36 of the Federal Rules of Civil Procedure, the Defendants, by and through their attorneys, Thomas L. Dunigan, Deputy Attorney General, and Albert L. Pitts, Assistant Attorney General, reply to Plaintiff's Requests for Admissions, for purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at trial, as follows:

REQUESTED ADMISSION NO. 6. Eight-five percent or more of the elk herd maintain themselves permanently within the exterior boundaries of Mescalero Apache Reservation. The remaining fifteen percent occasionally spend short periods of time in the White Mountain Wilderness Area or the Lincoln National Forest. The elk seldom leave tribal or federal land.

ANSWER: The Defendants cannot truthfully admit or deny the statements made in Request for Admission No. 6 because the Plaintiff has failed to document such allegations and the Defendants have no independent means of ascertaining the truth of the statements contained in Request for Admission No. 6.

REQUESTED ADMISSION NO. 7. The Mescalero Apache Tribe employs seven full-time tribal conservation officers who work in conjunction with the Bureau of Indian Affairs to assure conservation of fish and game within the Reservation. BIA assists the Mescalero Apache Tribe in game management and in addition to Butch Blazer, a full-

time range conservationist, the BIA can call on specialized professionals when needed.

The Reservation is patrolled on a twenty-four hour basis.

ANSWER: The Defendants admit that the Mescalero Apache Tribe employs seven full-time tribal conservation officers who assist Butch Blazer, a BIA range conservationist, with certain game management functions, and that the BIA is able on occasion to provide additional technical assistance. The Defendants further admit that certain districts of the Reservation are patrolled on a twenty-four hour basis during certain periods. All other matters contained in Request For Admission No 7 are specifically denied.

REQUESTED ADMISSION NO. 8. Tribal conservation officers and BIA officers jointly conduct annual aerial surveys of deer and elk population and semi-annual aerial studies of the antelope population. In addition, pellet group transect studies are conducted twice a year to show the trend in deer and elk population. Bear population is estimated on the number of group sightings. As a result of these studies, Tribal and BIA conservation officials make yearly recommendations to the Tribal Council as to appropriate seasons and game limits consistent with conservation of the Reservation wildlife. The Tribe bases the number of permits that it issues on study of resources available, not on the Tribe's need for revenue.

ANSWER: The Defendants admit that tribal conservation officers assist Butch Blazer, a BIA range conservationist, in making aerial surveys of deer, elk and antelope population on the Reservation and that pellet group transect studies are also conducted on the Reservation to show the trend in deer and elk population. The Defendants further admit that Butch Blazer and tribal conservation officers make yearly recommendations to the Tribal Council as to bag limits for deer, elk and antelope. The Defendants specifically deny all other statements contained in Request for Adminission No. 8.

REQUESTED ADMISSION NO. 9. Tribal conservation officers are trained through the National Park training course and/or the BIA police academy at Brigham City, Utah.

ANSWER: The Defendants admit only that three of the tribal conservation officers have attended the National Park training course. The Defendants specifically deny all other statements contained in Request for Admission No. 9.

REQUESTED ADMISSION NO. 10. The conservation officers perform enforcement functions to protect game and management functions such as game studies, transects, pellet count groups, and aerial surveys in order to advise the Tribal Council as to appropriate bag limits and seasons.

ANSWER: The Defendants admit the truth of the matters set forth in Requested Admission No. 10.

REQUESTED ADMISSION NO. 11. The external boundary of the Mescalero Reservation is clearly marked by fences.

ANSWER: The Defendants admit that only a part of the exterior boundary of the Mescalero Reservation is marked by fences. The Defendants deny all other matters set forth in Requested Admission No. 11.

REQUESTED ADMISSION NO. 27. No Dingle-Johnson funds have been spent within the Mescalero Apache Reservation within the last six to eight years.

ANSWER: The Defendants admit the truth of the statements made in Request for Admission No. 27.

REQUESTED ADMISSION NO. 28. The only Dingle-Johnson funds which have arguable (sic) indirectly benefited the Mescalero Apache Tribe in the last six to eight years are those used to publish the state's annual fishing proclamation which contains information concerning fishing on the Reservation.

ANSWER: The Defendants deny the truth of the statements made in Request for Admission No. 28.

REQUESTED ADMISSION NO. 29. New Mexico has not stocked any lakes within the Mescalero Reservation within the last ten years.

ANSWER: The Defendants admit the truth of the statements made in Request for Admission No. 29.

Plaintiff's Exhibit No. 24

TREATY OF 1852, 10 STAT 979

TREATY WITH THE APACHES. JULY 1, 1852.

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Preamble.

WHEREAS a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

ARTICLE of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and

Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

Authority of United States acknowledged.

ARTICLE 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Peace to exist.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

The Apaches not to assist other tribes in hostilities.

Good treatment of citizens of the United States by nations at peace with them.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Cases of aggression on them to be referred to government. Laws to be conformed to.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Provisions against incursions into Mexico.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons injuring the Apaches to be tried and punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Free passage over the Apache territory.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Military posts, agencies, and trading houses to be established.

ARTICLE 8. In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Territorial boundaries to be adjusted.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the

United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper. Presents to the Apaches.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians. When treaty to be binding. How construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES:

F. A. CUNNINGHAM, *Paymaster, U. S. A.*	E. V. SUMNER. *Brt. Col. U. S. A. comdg 9th Dept. In charge of Executive Office of New Mexico.*	[SEAL]
J. C. McFERRAN, *1st Lt. 8d Inf. Ast. Adj. Gen.*	JOHN GREINER, *Act. Supt. Indian Affairs. New Mexico.*	[SEAL]
CALEB SHERMAN.	CAPITAN VUELTA, his x mark	[SEAL]
FRED. SAYNTON.	CUENTAS AZULES, his x mark	[SEAL]
CHAS, McDOUGALL, *Surgeon, U. S. A.*	BLANCITO ——, his x mark	[SEAL]
S. M. BAIRD, *Witness to the signing of Mangus Colorado.*	NEGRITO ——, his x mark	[SEAL]
JOHN POPE, *Bvt. Cnpt. T. E.*	CAPITAN SIMON, his x mark	[SEAL]
	MANGUS COLORADO, his x mark	[SEAL]

AND WHEREAS, the said Treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three, advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
March 23d, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest— ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-three, and of the Independence of the United States the Seventy-seventh.

[L. S.]

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

Plaintiff's Exhibit 25

EXECUTIVE ORDERS RELATING TO MESCALERO APACHE RESERVATION

Executive Orders

Relating to

Indian Reservations

From May 14, 1855
to July 1, 1912

FORT STANTON OR MESCALERO APACHE RESERVATION.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

May 23, 1873.

The above diagram is intended to show a proposed reservation for the Mescalero Band of Apache Indians in New Mexico; said proposed reservation is indicated on the diagram by the red lines bordered with yellow, and is described as follows, viz:

Commencing at the southwest corner of the Fort Stanton reduced military reservation, and running thence due south to a point on the hills near the north bank of the Rio Rindoso; thence along said hills to a point above the settlements; thence across said river to a point on the opposite hills, and thence to the same line upon which we start from Fort Stanton; and thence due south to the thirty-third degree north latitude; thence to the top of the Sacramento Mountains, and along the top of said mountains to the top of the White Mountains; thence along the top of said mountains to the headwaters of the Rio Nogal to a point opposite the starting point, and thence to the starting point.

I respectfully recommend that the President be requested to order that the land comprised within the above-described limits be withheld from entry and settlement as public lands, and that the same be set apart as an Indian reservation, as indicated in my report to the department of this date.

EDW. P. SMITH, *Commissioner.*

DEPARTMENT OF THE INTERIOR,
May 26, 1873.

Respectfully presented to the President, with the recommendation that he make the order above proposed by the Commissioner of Indian Affairs.

C. DELANO, *Secretary.*

EXECUTIVE MANSION, *May 29, 1873.*

It is hereby ordered that the tract of country above described be withheld from entry and settlement as public lands, and that the same be set apart as a reservation for the Mescalero Apache Indians, as recommended by the Secretary of the Interior and Commissioner of Indian Affairs.

U. S. GRANT.

EXECUTIVE MANSION, *February 2, 1874.*

In lieu of an Executive order dated the 29th of May last, setting apart certain lands in Mew Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition, and set apart for the use of said Mescalero Apaches and such other Indians as the department may see fit to locate thereon, the tract of country in New Mexico (except so much thereof as is embraced in the Fort Stanton reduced military reservation) bounded as follows, viz:

Beginning at the most northerly point of the Fort Stanton reduced military reservation; thence due west to the summit of the Sierra Blanca Mountains; thence due south to the thirty-third degree north latitude; thence due east to a point due south of the most easterly point of the said Fort Stanton reduced military reservation; thence due north to the southern boundary of township 11; thence due west to the southwest corner of township 11, in range 13; thence due north to the second correction line south; thence due east along said line to a point opposite the line running north from the thirty-third degree north latitude; thence due north to the most easterly point of said Fort Stanton reduced military reservation; thence along the eastern boundary of said military reservation to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *October 20, 1875.*

In lieu of Executive order dated February 2, 1874, setting apart certain lands in New Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition, and set apart for the use of said Mescalero Apaches, and such other Indians as the department may see fit to locate thereon, the tract of country in New Mexico (except so much thereof as is embraced in the Fort Stanton reduced military reservation) bounded as follows:

Beginning at the most northerly point of the Fort Stanton reduced military reservation; running thence due west to a point due north of the northeast corner of township 14 south, range 10 east; thence due south along the eastern boundary of said township to the thirty-third degree north latitude; thence due east on said parallel to a point due south of the most easterly point of the said Fort Stanton reduced military reservation; thence due north to the southern boundary of township 11; in range 13; thence due north to the second correction line south; thence due east along said line to a point opposite the line running north from the thirty-third degree north latitude; thence due north to the most easterly point of said Fort Stanton reduced military reservation; thence along the northeastern boundary of said military reservation to the place of beginning.

U. S. GRANT.

EXECUTIVE MANSION, *May 19, 1882.*

In lieu of Executive order dated October 20, 1875, setting apart certain lands in New Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition, and set apart for the use of the said Mescalero Apaches and such other Indians as the department may see fit to locate thereon, the tract of country in New Mexico bounded as follows:

Beginning at the northeast corner of township 12 south, range 16 east of the principal meridian in New Mexico; thence west along the north boundary of township 12 south, ranges 16, 15, 14, and 13

Beginning at the northeast corner of township 12 south, range 16 east of the principal meridian in New Mexico; thence west along the north boundary of township 12 south, ranges 16, 15, 14, and 13 east, to the southeast corner of township 11 south, range 12 east; thence north along the east boundary of said township to the second correction line south; thence west along said correction line to the northwest corner of township 11 south, range 11 east; thence south along the range line between ranges 10 and 11 east to the southwest corner of Township 12, the range 11 east; thence east along the south boundary of said township to the southeast corner thereof; thence south along the range line between ranges 11 and 12 east to the thirty-third degree of north latitude, as established and marked on the ground by First Lieut. L. H. Walker, Fifteenth Infantry, United States Army, in compliance with Special Orders, No. 100, series of 1875, Headquarters District of New Mexico; thence east along said thirty-third degree of north latitude to its intersection with the range line between ranges 16 and 17 east; thence north along said range line to the place of beginning.

CHESTER A. ARTHUR.

EXECUTIVE MANSION, *March 24, 1883.*

In lieu of Executive order dated May 19, 1882, setting apart certain lands in New Mexico as a reservation for the Mescalero Apaches, which order is hereby canceled, it is hereby ordered that there be withdrawn from sale or other disposition and set apart, for the use of the said Mescalero Apaches and such other Indians as the Secretary of the Interior may see fit to locate thereon, the tract of country in New Mexico bounded as follows:

Beginning at the northeast corner of township 12 south, range 16 east of the principal meridian in New Mexico; thence west along the north boundary of township 12 south, ranges 16, 15, 14, and 13 east to the southeast corner of township 11 south, range 12 east; thence north along the east boundary of said township to the second correction line south; thence west along said correction line 12 miles; thence south 12 miles; thence east 6 miles; thence south to the thirty-third degree of north latitude, as established and marked on the ground by First Lieut. L. H. Walker, Fifteenth Infantry, U. S. A., in compliance with Special Orders, No. 100, series of 1875, Headquarters District of New Mexico; thence east along said thirty-third degree of north latitude to its intersection with the range line between ranges 16 and 17 east; thence north along said range line to place of beginning.

CHESTER A. ARTHUR.

THE WHITE HOUSE, *March 1, 1910.*

It is hereby ordered that all lands within the Mescalero Apache Indian Reservation, New Mexico, embraced in small holdings claims Nos. 484 and 486, township 13 south, range 12 east, New Mexico principal meridian, as shown on the records of the General Land Office and the blue print attached herewith, be and the same are hereby restored to the public domain.

WM. H. TAFT

THE WHITE HOUSE, *Feby. 17, 1912.*

Under authority of the act of Congress of June 4, 1897 (30 Stat., 11 at 34 and 36), and upon recommendation of the Secretary of Agriculture, it is hereby ordered that on and after March 1, 1912, the boundaries of the Alamo National Forest, New Mexico, as proclaimed March 2, 1909, and modified by subsequent proclamation of October 20, 1910, be further modified by excluding therefrom all of that part of the Mescalero Apache Indian Reservation included in the said Alamo National Forest by the said proclamation of March 2, 1909.

The purpose of this exclusion is to restore the Mescalero Apache Indian Reservation in all respects to the status existing prior to the said proclamation of March 2, 1909, as though the inclusion of the lands within the Alamo National Forest had not been ordered, and said Indian reservation is hereby fully recreated and restored to that status.

WM. H. TAFT.

GILA RESERVATION.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS,
May 14, 1860.

SIR: This office having signified to Agent Steck its approbation of the establishment of a reservation in New Mexico for the Gila Apaches, including the Miembres, Mogollon, and Chilicayia Bands of that tribe, he suggests the following boundaries for the same, viz: "Commencing at Santa Lucia Spring and running north 15 miles; thence west 15 miles; thence south 15 miles; thence east 15 miles to the place of beginning.

Agent Steck has been directed to have the boundaries of the reserve, as indicated by him, run out and marked, and to give notice thereof to the surveyor general of New Mexico.

I have, therefore, to request that you will give instructions to that officer to respect the said reserve when in the progress of the public surveys he comes to connect them with the external boundaries of said reserve.

Very respectfully, your obedient servant,

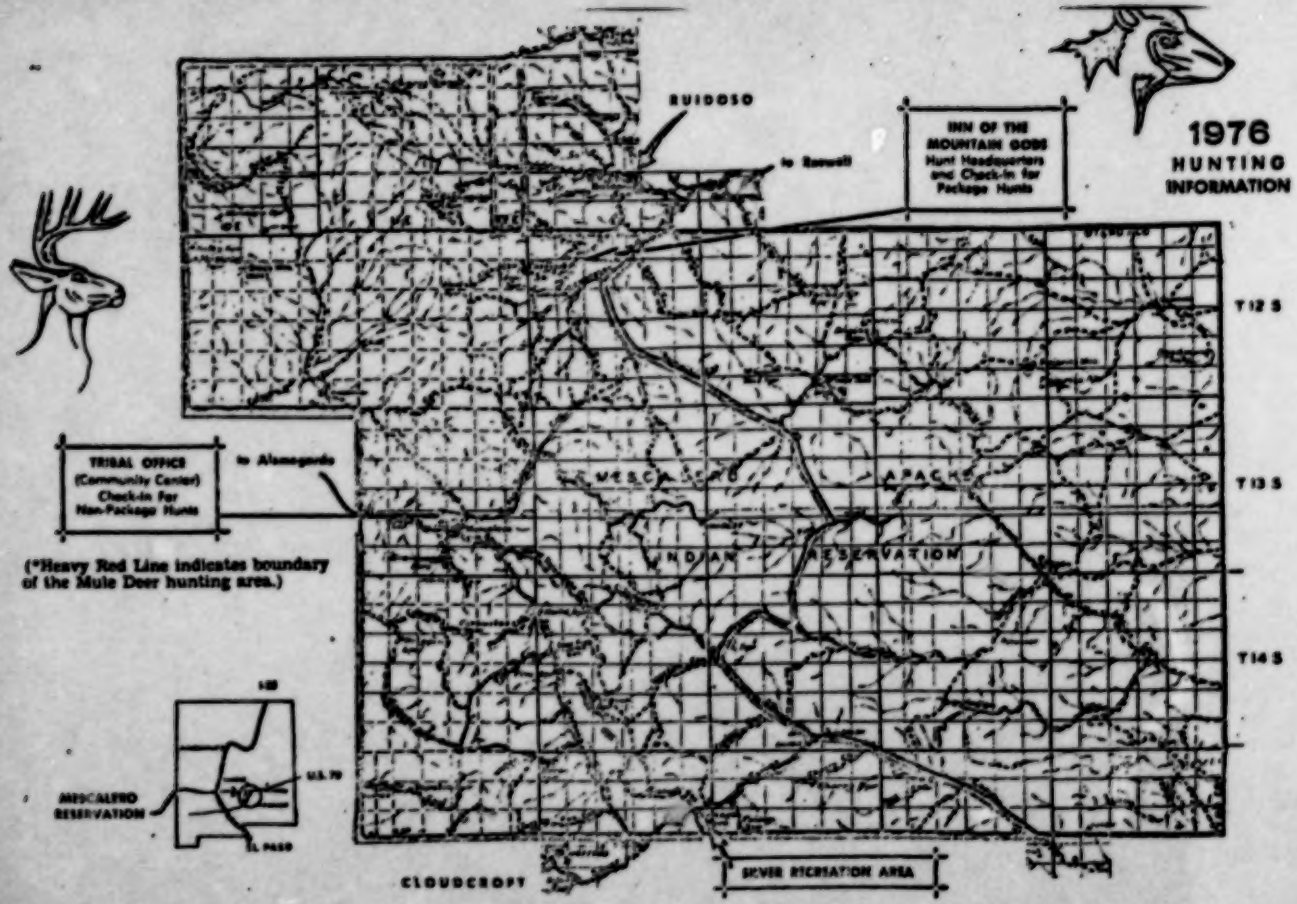
A. B. GREENWOOD,
Commissioner.

Hon. JOSEPH S. WILSON,
Commissioner General Land Office.
(Occupied for a short time only and then abandoned. See Land Office Report for 1872, p. 128.)

HOT SPRINGS RESERVATION.

EXECUTIVE MANSION, *April 9, 1874*

It is hereby ordered that the following-described tract of country in the Territory of New Mexico be, and the same is hereby, withdrawn from sale and reserved for the use and occupation of such


RUIDOSO
to Roswell
INN OF THE MOUNTAIN GODS
Hunt Headquarters and Check-in for Package Hunts
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HUNTING
INFORMATION
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T13 S
T14 S
TRIBAL OFFICE
(Community Center)
Check-in For
Non-Package Hunts
to Alamogordo
MESCA
APACHE
INDIAN
RESERVATION
(*Heavy Red Line indicates boundary of the Mule Deer hunting area.)
MESCALERO
RESERVATION
US 70
CLOUDCROFT
SILVER RECREATION AREA

Plaintiff Exhibit No. 27

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

REVISED CONSTITUTION OF THE APACHE TRIBE

of the

MESCALERO INDIAN RESERVATION
NEW MEXICO

APPROVED MARCH 25, 1936
REVISED JANUARY 12, 1965

(SEAL)

REVISED
CONSTITUTION OF THE APACHE TRIBE
of the
MESCALERO RESERVATION

PREAMBLE

We, the members of the Apache Tribe of the Mescalero Reservation, in order to promote justice, insure tranquility, encourage the general welfare, foster the social and economic advancement of our people, safeguard our interests, bring our representative tribal government into closer alingment with State and National governments, and secure for ourselves and for our posterity the blessings of freedom and liberty, do hereby establish this revised constitution as the foundation upon which our tribal government shall rest.

ARTICLE I—THE MESCALERO APACHE TRIBE

SECTION 1. The Apache Tribe of the Mescalero Reservation, hereinafter referred to as the Mescalero Apache Tribe, shall include all persons recognized as members thereof, or upon whom membership may be conferred, pursuant to the provisions and restrictions imposed by Article IV of this constitution, irrespective of the Apache Band with which they may be identified.

ARTICLE II—TERRITORY

SECTION 1. The jurisdiction of the Mescalero Apache Tribe, its tribal council and courts shall extend to all the territory within the exterior boundaries of the reservation, and to such other lands as may be added thereto by purchase, gift, Act of Congress, or otherwise.

ARTICLE III—RESERVATION LANDS

SECTION 1. Title to reservation lands shall remain tribal property and shall not, in whole or in part, be granted by allotment or otherwise to tribal members or groups of members as private property. The control of reservation lands, and of assignments or leases thereof, and of other tribal property, shall be in the tribal council, subject to applicable Federal authority, and regulated by ordinances not inconsistent with or contrary to this constitution.

SEC. 2. The tribal council shall have power to assign unused tribal lands, or to reassign any unused assignments, or portions thereof, which have been idle for two (2) or more years. No reassignment of a homestead may be made so long as the original assignee shall reside on the homesite, unless he shall voluntarily release the homesite to the tribe. A member may transfer his homesite to one of his children. The tribal council shall decide by ordinance what shall constitute a unit for purposes of assignment of land for private use, and shall determine the rules governing the use and transfer of such assignments.

SEC. 3. A non-member who is the surviving spouse of a member of the tribe shall have the privilege to use an assignment for the benefit of enrolled minor children, but a non-member shall not acquire any vested interest or rights in any tribal property, except as otherwise provided by ordinance of the tribal council, or by applicable Federal law.

ARTICLE IV—MEMBERSHIP

SECTION 1. The membership of the Mescalero Apache Tribe shall consist of the following persons:

(a) Any person whose name appeared on the Census Roll of the Mescalero Apache Agency of January 1, 1936.

(b) All persons born to resident members after the census of January 1, 1936, and prior to the effective date of this constitution.

(c) Any child born to a non-resident member, prior to the effective date of this constitution, provided that such child shall have resided on the Mescalero Reservation for not less than one (1) year immediately preceding the date of enrollment.

(d) Any person of one-fourth degree or more Mescalero Apache blood, born after the effective date of this constitution, either one or both of whose parents is (are) enrolled in the membership of the Mescalero Apache Tribe.

SEC. 2. No person, being enrolled or recognized as a member of another tribe, shall be eligible for enrollment in the Mescalero Apache Tribe.

SEC. 3. The tribal council shall have the power to adopt ordinances, consistent with this constitution, governing future membership, loss of membership, and the adoption of members into the Mescalero Apache Tribe, which ordinances shall be subject to review by the Secretary of the Interior.

SEC. 4. The tribal council shall have the power to prescribe rules to govern the compilation and maintenance of a membership roll, and to make corrections in the basic roll, subject to the approval of the Secretary of the Interior.

SEC. 5. The constitution of the Mescalero Apache Tribe, and ordinances enacted pursuant thereto, shall govern tribal membership and enrollment. No decree of any non-tribal court purporting to determine membership in the tribe, determine paternity, or determine the degree of Indian blood, shall be recognized for membership purposes. The tribal council shall have sole authority and original jurisdiction to determine eligibility for enrollment, except where the membership of an individual is dependent upon an issue of paternity, in which case the trial court, or the tribal council sitting as an appellate court, shall have authority and exclusive jurisdiction.

ARTICLE V—BILL OF RIGHTS

SECTION 1. Subject to the limitations prescribed by this constitution, all members of the Mescalero Apache Tribe shall

have equal political rights and equal opportunities to participate in the economic resources and tribal assets, and no member shall be denied freedom of conscience, speech, religion, association or assembly, nor shall he be denied the right to petition the tribal council for the redress of grievances against the tribe.

Article VI—Disqualification of Tribal Members for Elective Office

Section 1. No person who has been convicted of any felony or other serious offense, including adultery, bribery, embezzlement, extortion, fraud, forgery, misbranding, perjury, theft, habitual drunkenness, or felonious assault or felonious battery, shall be eligible for candidacy to any elective office of the Mescalero Apache Tribe unless he shall have been pardoned by the President of the Mescalero Apache Tribe in conformity with applicable ordinances and procedures prescribed by the tribal council.

Article VII—Organization of the Government of the Mescalero Apache Tribe

Section 1. The powers of the government of the Mescalero Apache Tribe are divided into three distinct departments, the Legislative, the Executive and the Judicial, and no person or group of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as this constitution may otherwise expressly direct or permit.

Article VIII—Part I—The Legislative Department: Composition and Qualifications

Section 1. The legislative powers of the Mescalero Apache Tribe shall rest in the Mescalero Apache Tribal Council, hereinafter referred to as the tribal council, which shall hold its sessions at the seat of the tribal government.

SEC. 2. The tribal council shall consist of eight (8) members, elected at large from the membership of the Mescalero Apache Tribe.

SEC. 3. The members of the tribal council shall be at least twenty-five (25) years of age at the time of election or appointment (Article X, Section 4); shall have one-quarter or more Mescalero Apache Indian blood; shall have resided on the Mescalero Apache Reservation for a period of at least six (6) months immediately prior to the election, and shall be subject to the restrictions set out in Article VI.

SEC. 4. No person shall serve as a member of the Mescalero Apache Tribal Council while holding any other elective office, or policy making position with the tribe or with any organization doing business on the Mescalero Reservation.

ARTICLE IX—NOMINATIONS AND ELECTIONS

SECTION 1. An election board, appointed by the president of the Mescalero Apache Tribe, shall supervise and administer all elections in accordance with established tribal ordinances, and in conformity with this constitution; provided that no member of the election board shall be at the same time a member of the tribal council or a candidate for tribal office, and provided further that persons so appointed by the president shall be confirmed by the tribal council.

SEC. 2. Any member of the Mescalero Apache Tribe shall have the right to vote in any tribal election provided such member:

(a) Is at least twenty-one (21) years of age at the time of such election.

(b) Has resided within a fifty (50) mile radius of the tribal administration office, which office is located on the reservation, for a period of at least six (6) months immediately prior to the day of election.

SEC. 3. Members of the tribal council, and all other elective officials of the Mescalero Apache Tribe, shall be chosen

by secret ballot, the form of which shall be established by ordinance enacted by the tribal council.

SEC. 4. The tribal council, by ordinance, shall make provision for absentee voting, including the use of a secret ballot for this purpose.

SEC. 5. No member of the Mescalero Apache Tribe shall be deprived of his right to vote, if otherwise qualified, because of temporary absence from the reservation. Temporary absence shall be defined, for purposes of this section, as follows:

(a) Absence for the purpose of attending an educational institution for purposes of obtaining formal training, or

(b) Absence for purposes of receiving treatment at a regular hospital, clinic or sanitarium, or

(c) Absence for purposes of service in the Armed Forces of the United States, or

(d) Absence for purposes of obtaining additional educational training in regularly held training sessions, or

(e) Absence for any other reason which does not exceed six (6) months, duration, immediately preceding a tribal election, without return to the physical limits of the reservation.

SEC. 6. Any qualified member of the Mescalero Apache Tribe who desires that his (her) name be placed on the ballot as a candidate for the office of president, vice-president or council member in the primary election shall file with the tribal secretary a statement of intention showing his (her) name and the office for which he (she) desires to become a candidate. Such statement shall be filed not less than fifteen (15) days preceding the primary election.

SEC. 7. A primary election to select candidates for the offices of the president, vice-president and council members shall be held at least thirty (30) days before the general election of the tribe. The two nominees receiving the highest number of votes for president shall be the only candidates for

the office of president at the next general election. The two nominees receiving the highest number of votes for vice-president shall be the only candidates for vice-president in the next general election. The eight nominees receiving the highest number of votes, for council members shall be the only candidates for council members in the next general election.

SEC. 8. General elections to vote for tribal council members and all elected officers of the Mescalero Apache Tribe shall be held annually on the third Friday of December. Notice of both the primary and general elections shall be posted at least thirty (30) days before each such election at the voting place and in three (3) or more additional public places. Such notice shall be posted by the secretary of the tribal council. In case the time of the general election should conflict with a holiday, the election shall be held on the following work day.

SEC. 9. No candidate shall be permitted to withdraw except by filing a written notice thereof with the tribal secretary at least twelve (12) days before the primary and the general election. The tribal secretary shall post the names of all candidates at the voting place, and at three or more additional public places at least ten (10) days before the primary and general election.

SEC. 10. The first election of tribal council members and officers under this constitution shall be held on the first general election date following its adoption and ratification. The candidate with the highest number of votes for the office of president shall hold the office for two (2) years. The candidate with the highest number of votes for the office of vice-president shall hold that office for two (2) years. The four candidates receiving the highest number of votes for council member-at-large shall hold office for two (2) years. The four candidates receiving the next highest number of votes for council member-at-large shall hold office for one (1) year. Tie votes shall be decided by lot. The term of office for these newly elected council members shall start on the second Friday of the month of January following the election, at which time the incumbent business committee will be dissolved.

SEC. 11. Succeeding members of the Mescalero Apache Tribal Council shall be elected to serve for a term of two (2) years, with one-half of the members-at-large thereof elected each year. The term of office of newly elected members shall start on the second Friday of the month of January following the election.

SEC. 12. The candidate receiving the highest number of votes at the general election for the office of president shall become the president. The candidate receiving the highest number of votes at the general election for the office of vice-president shall become the vice-president.

SEC. 13. The four candidates for the office of councilman-at-large receiving the highest number of votes cast in each general election, and the winning candidates for the office of president and vice-president, shall be certified to the tribal council by the election board as the duly elected councilmen and officers of the tribe.

SEC. 14. No person shall be a candidate for more than one office in any primary election.

SEC. 15. Any tie vote shall be decided by lot before the tribal council.

ARTICLE X—VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. Any member of the tribal council or elected officer of the Mescalero Apache Tribe who, during the term for which he is elected, is convicted of any felony, shall automatically forfeit his office. Any member of the tribal council or elected officer found guilty of a misdemeanor involving moral turpitude, gross neglect of duty, malfeasance in office or misconduct reflecting on the dignity and integrity of the tribal government, may be removed from office by majority vote of the tribal council. Before any vote for removal from office is taken, such member or officer shall be given a written statement of the charges against him at least five (5) days before the meeting of the tribal council before which he is to appear, and he shall be given an opportunity to answer any and all charges

at the designated council meeting. The decision of the tribal council shall be final.

SEC. 2. Upon receipt of a petition signed by at least twenty-five percent (25%) of the eligible voters demanding recall of any member of the tribal council, or elected officer, filed with the secretary of the tribal council at least four (4) months before the expiration of such council member's, or official's, term of office, it shall be the duty of the tribal council to call a special election upon the question of recall. Such election shall be held not less than twenty-five (25) nor more than forty (40) days from the filing of the petition. No council member or elected officer may be recalled unless a majority of the members voting vote in favor of the recall, and unless at least thirty percent (30%) of the eligible voters vote in the election.

SEC. 3. If a member of the tribal council fails to attend two (2) successive meetings of the tribal council or a committee thereof, of which he is a member, or any combination of tribal council or such committee meetings, he shall automatically cease to be a member of the tribal council. In such event, the tribal council shall declare the position vacant and the president shall, subject to confirmation by the tribal council, appoint a successor to serve the unexpired term, unless such member

(a) Is excused by the tribal council, or

(b) Is absent by reason of illness, or due to reasons beyond his control, which are satisfactory to the tribal council.

SEC. 4. In the event of a vacancy, for any cause, in the membership of the tribal council, the unexpired term corresponding to the vacancy shall be filled by a qualified person, appointed by the president and confirmed by the tribal council.

ARTICLE XI—POWERS OF THE TRIBAL COUNCIL

SECTION 1. The Mescalero Apache Tribal Council shall have the following duties and powers subject to all applicable

laws of the United States, this constitution, and the regulations of the Secretary of the Interior.

(a) To veto the sale, disposition, lease, or encumbrance of tribal lands, interest in lands, or other tribal assets, that may be authorized by any agency of government without the consent of the tribe; and any encumbrance, sale, grant, or lease of any portion of the reservation, or the grant of any rights to the use of lands or other assets, or the grant of relinquishment of any water or mineral rights or other natural or fiscal assets of the Mescalero Reservation, are hereby reserved to the sanction of the tribal council.

(b) To encumber, lease, permit, sell, assign, manage or provide for the management of tribal lands, interests in such lands or other tribal assets; to purchase or otherwise acquire lands or other tribal assets; to purchase or otherwise acquire lands or interests in lands within or without the reservation; and to regulate the use and disposition of tribal property of all kinds.

(c) To protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation, provided that any ordinance directly affecting non-members of the tribe shall be subject to review by the Secretary of Interior.

(d) To adopt and approve plans of operation to govern the conduct of any business or industry that will further the economic well-being of the members of the tribe, and to undertake any activity of any nature whatsoever, not inconsistent with Federal law or with this constitution, designed for the social or economic improvement of the Mescalero Apache people, such plans of operation and activities to be subject to review by the Secretary of the Interior.

(e) To use tribal funds as loans or grants, and to transfer tribal property and other assets, to tribal corporations, associations, commissions or boards for such use as

the tribal council may determine in conformity with this constitution and consistent with applicable Federal laws and regulations.

(f) To authorize the president to negotiate contracts, leases and agreements of every description not inconsistent with Federal law or with this constitution, subject to review or approval by the Secretary of the Interior where such review or approval is required by statute or regulations; Provided, that all contracts, leases and agreements so negotiated shall be subject to approval by the tribal council.

(g) To acquire, by condemnation, lands of tribal members on the reservation, for public purposes, provided that such members shall be reimbursed the full value of improvements they have placed on such lands as determined by appraisal. The manner of appraisal and the procedures governing condemnation shall be established by ordinance of the tribal council, subject to review by the Secretary of the Interior.

(h) To regulate its own procedures, including the adoption and amendment of bylaws; to appoint subordinate boards, commissions, committees, tribal officials and employees not otherwise provided for in this constitution and to prescribe their salaries, tenure and duties; to charter tribal corporations, and to charter and regulate other subordinate organizations for economic and other purposes, subject to review by the Secretary of the Interior when required by Federal law or regulation.

(i) To represent the tribe and act in all matters that concern the welfare of the tribe and to make decisions not inconsistent with, or contrary to, this constitution.

(j) To negotiate with the Federal, State, or local Governments, and to advise and consult with representatives of the Interior Department on all activities that may affect the reservation, and in regard to all appropriation estimates and Federal projects for the benefit of the tribe before such estimates or projects are submitted to the Bureau of the Budget and to Congress.

(k) To borrow money from the Federal Government or other lenders for tribal use.

(l) To administer any funds or property within the exclusive control of the tribe, and to make expenditures from available funds for public purposes of the tribe, including salaries and remuneration of elective officials, officers and tribal employees. With the approval of the Secretary of the Interior, tribal funds from any source may be authorized for dividend or per capital payments to the members of the tribe.

(m) To administer charity.

(n) To make loans to tribal members in accordance with regulations of the Secretary of the Interior, this constitution and other applicable laws.

(o) To employ legal counsel for the protection and advancement of the rights of the tribe and its members, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior, so long as such approval is required by Federal law.

(p) To enact ordinances, subject to review by the Secretary of the Interior, establishing and governing tribal courts and tribal law enforcement agencies on the reservation; regulating social and domestic relations of members of the tribe; including provision for the issuance of decrees of divorce, provided that all marriages between tribal members shall be in conformity with applicable laws of the State; providing for the appointment of guardians for minors and mental incompetents; regulating the inheritance of personal property of tribal members; and providing for the removal or exclusion from the reservation of any non-members of the Mescalero Apache Tribe whose presence may be injurious to tribal members or to the interests of the tribe, as determined by the tribal council.

(q) To issue to each of its members a non-transferable certificate of membership, evidencing the equal share of each member in the assets of the tribe, said tribe being in the nature of a non-profit corporation, and to use any net

income return to the tribe from corporate enterprises for public and social purposes of the tribe.

(r) To administer oaths; to require, upon proper notice being given stating time and place of hearing and the general nature of the subject to be discussed, any member of the tribe to appear and give testimony before the tribal council; and to provide by ordinance, subject to review by the Secretary of the Interior, for punishment of such members upon failure to comply with such requirements, or for giving false testimony.

(s) To enact and provide for the enforcement of ordinances, subject to review by the Secretary of the Interior, for the assessment of taxes, licensing and other fees on persons or organizations doing business on the reservation.

(t) No authority or power contained in this constitution may be delegated by the Mescalero Apache Tribal Council to tribal officials, committees, or associations to carry out any functions or do any thing for which primary responsibility is vested in the tribal council, except by ordinance or resolution duly enacted by the tribal council.

(u) To deposit, to the credit of the Mescalero Apache Tribe, tribal funds, without limitation on the amount in any account, in any National or State bank whose deposits are insured by any agency of the Federal Government; Provided, that advances to the tribe from funds held in trust in the United States Treasury shall be deposited with a bonded disbursing officer of the United States whenever the conditions prescribed by the Secretary of the Interior in connection with such advance, require that the advance be so deposited.

(v) To exercise tribal powers independently, under this constitution, whenever limitations on such free exercise of tribal powers, imposed by regulations of the Secretary of the Interior, are removed; to exercise other inherent powers not heretofore exercised or included in this constitution; and to exercise powers which have been excluded from

tribal authority by applicable statutes of Congress, in the event such statutes are amended or rescinded; provided, that except for waiver of Secretarial review or approval authority, the exercise of additional tribal powers, by the tribal council, shall be in conformity with appropriate amendments to this constitution, pursuant to the provisions of Article XV and Article XXVII hereof.

ARTICLE XII—REVIEW AND APPROVAL OF ENACTMENTS

SECTION 1. Every resolution or ordinance passed by the tribal council shall, before it becomes effective, be presented to the president for approval within five (5) days following the date of its passage. If he approves he shall sign it within ten (10) days following its receipt and deposit it with the Secretary of the Mescalero Apache Tribe for such further action as may be necessary. If he does not sign an enactment of the tribal council, he shall, at the next meeting of the tribal council following its submittal to him for signature, return it to the tribal council with a statement of his objections. It shall thereafter not become effective unless it is again approved by two-thirds of the members present, providing that those present constitute a quorum of the tribal council.

SEC. 2. Every resolution or ordinance which, under this constitution is subject to review by the Secretary of the Interior, shall be, within ten (10) days following its approval by the president or, in the event of presidential veto, by a two-thirds majority of the tribal council as provided in Section 1 of Article XII above, presented to the Superintendent of the Mescalero Reservation. Within ten (10) days after receipt thereof, the Superintendent shall approve or disapprove the same.

SEC. 3. If the Superintendent shall approve any resolution or ordinance subject to review by the Secretary of the Interior, it shall thereupon become effective, but the Superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of such approval by the Superintendent rescind

the said resolution or ordinance for any cause, by transmitting notification to the President of the Mescalero Apache Tribe of such rescission.

SEC. 4. If the Superintendent shall refuse or fail to approve any resolution or ordinance submitted to him within ten (10) days after its receipt, he shall advise the tribal council of his reasons therefor, and if the reasons appear to the tribal council to be insufficient it may, by majority vote, refer the resolution or ordinance to the Secretary of the Interior who shall, within ninety (90) days from the date of receipt, approve or disapprove same in writing; Provided, however, that such resolution or ordinance shall become effective ninety (90) days after the date of receipt unless the Secretary of the Interior shall disapprove in writing such resolution or ordinance.

SEC. 5. Any resolution or ordinance that is, by the terms of this constitution, subject to the approval of the Secretary of the Interior, shall be presented to the Superintendent who shall, within 10 days after receipt thereof, transmit the same to the Secretary of the Interior with his recommendation for or against approval.

SEC. 6. The said resolution or ordinance shall become effective when approved by the Secretary of the Interior.

SEC. 7. Upon request by the tribal council, the Secretary of the Interior may waive any requirement contained in this constitution relating to review or approval of resolutions and ordinances, or to the exercise of other powers of the tribal council. Such waiver shall be for such period of time and under such conditions as the Secretary of the Interior may prescribe.

ARTICLE XIII—TRIBAL BUDGET AND BUSINESS ENTERPRISES

SECTION 1. Before the beginning of each fiscal year, the tribal council shall adopt and approve an annual tribal budget providing funds for the support of all approved tribal programs. No expenditures of tribal funds may be made except in conformity with the approved budget. The annual tribal budget shall be subject to such review and approval as may be required by the Secretary of the Interior.

SEC. 2. The Mescalero Apache Tribal Council shall, by ordinance, establish the principles and policies governing the operation and control of all enterprises of the tribe.

ARTICLE XIV—REFERENDUM

SECTION 1. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the tribe and filed with the secretary of the tribal council demanding a referendum thereon, any proposed or enacted resolution, ordinance or other action of the tribal council shall either be repealed by the tribal council or be submitted by it to the electorate for decision by the tribe in a general election to be held within thirty (30) days after receipt of the petition. The referendum shall be conclusive only if at least thirty percent (30%) of the qualified voters cast their ballots therein.

SEC. 2. When a majority of the members of the tribal council shall request a referendum on any proposed or enacted resolution, ordinance, or other action of the tribal council, the tribal council shall call an election within thirty (30) days thereafter at which the members of the tribe shall approve or disapprove, by majority vote, the ordinance or action in question; Provided, however, that such approval or disapproval shall be effective only in the event thirty percent (30%) or more of the qualified voters cast their ballots in such election.

SEC. 3. No referendum conducted pursuant to the provisions of Section 1 above shall serve to abrogate, modify, or amend any properly approved contract or agreement with third parties who are not members of the Mescalero Apache Tribe.

ARTICLE XV—CONSTITUTIONAL AMENDMENT

SECTION 1. This constitution may be amended at an election called by the Secretary of the Interior upon request by the tribal council:

(a) Whenever, by majority vote of all members of the tribal council, the governing body of the tribe shall

authorize the submission of a proposed amendment to the electorate of the tribe, or,

(b) Whenever a minimum of thirty percent (30%) of the qualified voters of the tribe, by signed petition, shall request such amendment.

SEC. 2. If, at such election, the amendment is adopted by majority vote of the qualified voters of the tribe voting therein, and if the number of ballots cast represents not less than thirty percent (30%) of the qualified voters, such amendments shall be submitted to the Secretary of the Interior and, if approved by him, it shall thereupon take effect.

ARTICLE XVI—SESSIONS OF THE TRIBAL COUNCIL

SECTION 1. The tribal council shall meet, upon 24 hours written notice to the membership thereof by the president, at the seat of tribal government, as provided in the bylaws; Provided, that not less than four (4) quarterly sessions shall be held in any year.

SEC. 2. Special sessions of the tribal council may be convened by the president or, if the president shall refuse to act, such special sessions may be convened by any three (3) members of the tribal council upon twenty-four (24) hours written notice signed by said three (3) members.

ARTICLE XVII—QUORUM; VOTE

SECTION 1. Six (6) members of the tribal council shall constitute a quorum of the membership thereof, provided that the vice-president of the tribe may vote as a member of the tribal council throughout the whole of that meeting only if a quorum is not otherwise present. No enactment of the tribal council shall have any validity or effect in the absence of a quorum of the membership thereof.

SEC. 2. No resolution or ordinance of the tribal council shall have any validity or effect unless it is passed by the tribal council at a legally called session in which a quorum of the membership was present, and until approved by the president or passed over his veto as provided by Article XII.

ARTICLE XVIII—ORDINANCES AND RESOLUTIONS

SECTION 1. All final decisions of the tribal council, on matters of permanent interest to members of the tribe and necessary to the orderly administration of tribal affairs, shall be embodied in ordinances, the format of which shall be established in the bylaws of the tribal council. Such enactments shall be available for public inspection at all reasonable times by members of the tribe.

SEC. 2. All final decisions of the tribal council on matters of temporary interest, or matters relating to particular individuals, officials or circumstances shall be embodied in resolutions. Such actions of the tribal council shall also be subject to public inspection by members of the tribe.

ARTICLE XIX—PART 2—THE EXECUTIVE DEPARTMENT: COMPOSITION AND MANNER OF SELECTION

SECTION 1. The Executive Department of the Mescalero Apache Tribal Government shall consist of a president, a vice-president, a secretary and a treasurer.

SEC. 2. The President and Vice-President of the Mescalero Apache Tribe shall be elected. The remaining officers shall be appointed by the president with the concurrence of the tribal council, and persons appointed to fill such offices shall serve during the pleasure of the president, provided that the tribal council must concur in the removal from office of any such appointive officer of the tribe.

ARTICLE XX—PRESIDENT AND VICE-PRESIDENT: TERM OF OFFICE AND QUALIFICATIONS

SECTION 1. The President and Vice-President of the Mescalero Apache Tribe shall be elected for a term of two (2) years. Candidates for the office of president and vice-president must possess the same qualifications required of candidates for council membership as set forth in Article VIII, Section 3 of this constitution. The term of office of the president and vice-president shall begin at the same time as the terms of members of the tribal council elected at the same election.

ARTICLE XXI—PRESIDENT AND VICE-PRESIDENT: VACANCIES AND REMOVAL FROM OFFICE

SECTION 1. In the event of a vacancy, for any cause, in the office of the president, the vice-president shall assume the duties of the president until a successor has been duly elected and qualified. In the event of a vacancy, for any cause, in the office of the vice-president, such vacancy shall be filled by a tribal member appoined by the tribal council, such person to serve until a successor has been duly elected and qualified. In the event of a vacancy, for any cause, in both executive offices, such vacancies shall be filled at a special election, called by the tribal council and conducted in conformity with applicable sections of Article IX of this constitution; except that the membership of the election board shall be appointed by the tribal council.

ARTICLE XXII—DUTIES OF OFFICERS

SECTION 1. The President of the Mescalero Apache Tribe shall exercise the following powers as the chief executive officer of the tribe:

(a) The president shall serve as the Chairman of the Mescalero Apache Tribal Council, but he shall not have the right to vote on any issue except to break a tie vote of the council in the absence of the vice-president.

(b) The president shall appoint all non-elected officials and employees of the executive department of the tribal government and shall direct them in their work, subject only to applicable restrictions embodied in this constitution or in enactments of the tribal council establishing personnel policies or governing personnel management.

(c) The president, subject to the approval of the tribal council, may establish such boards, committees or subcommittees as the business of the council may require, and shall serve as an ex-officio member of all such committees and boards.

(d) The president shall serve as contracting officer for the Mescalero Apache Tribe, following approval of all contracts by the tribal council.

(e) The president shall have veto power over enactments of the tribal council, as provided in Article XII, Section 1.

(f) Subject to such regulations and procedures as may be prescribed by ordinance of the tribal council, the president shall have power to grant pardons, after conviction for all offenses, to restore tribal members to eligibility for elective office in the tribal government, subject to the restrictions contained in Article X, Section 1.

(g) The president shall direct the tribal police, to assure the enforcement of ordinances of the tribal council.

(h) The president shall hold no other tribal office or engage in private remunerative employment without the consent of the tribal council, during his term as president.

SEC. 2. In the absence of the president, the vice-president shall preside and shall have all powers, privileges and duties of the president.

SEC. 3. The vice-president may function as chairman of the tribal council or of any committee thereof in the absence of, or at the direction of, the president. When presiding as chairman of the tribal council he shall have the right to vote

only in the event the council or any committee thereof is equally divided on an issue. In his capacity as vice-president, he may be counted for purposes of constituting a quorum at any such meeting and when so counted may vote on any business then before the council.

SEC. 4. The vice-president may attend any session of the tribal council or of any council committee and he may participate therein, but he shall not have the right to vote unless required to make a quorum or to break a tie.

SEC. 5. The vice-president shall perform such other duties as the president, with the consent of the tribal council, may direct.

ARTICLE XXIII—THE SECRETARY OF THE MESCALERO APACHE TRIBE

SECTION 1. The Secretary of the Mescalero Apache Tribe shall be appointed from within the membership of the tribal council.

SEC. 2. The secretary shall call the roll, handle all official correspondence of the council, keep the minutes of all regular and special meetings of the tribal council, and it shall be his duty to submit promptly to the Superintendent of the agency copies of minutes of all regular and special meetings of the tribal council. Following each general election, the secretary shall certify to the Superintendent of the reservation the duly elected president, vice-president, and councilmen. In the absence of the president and vice-president, the secretary shall carry on the duties of the president, subject to all restrictions thereon embodied in this constitution.

ARTICLE XXIV—TREASURER OF THE MESCALERO APACHE TRIBE

SECTION 1. The treasurer shall be appointed from within the membership of the tribal council.

SEC. 2. (a) The treasurer shall accept, receipt for, keep and safeguard all funds under the exclusive control of the tribe by depositing them in a bank insured by an agency of the Federal Government, or in an Individual Indian Money Account as directed by the Mescalero Apache Tribal Council, and shall keep an accurate record of such funds and shall report on all receipts and expenditures and the amount and nature of all funds in his custody to the council at regular meetings and at such other times as requested by the council. He shall not pay or otherwise disburse any funds in custody of the council except when properly authorized to do so by the council.

(b) The books and records of the treasurer shall be audited at least once a year by a competent auditor employed by the council, and at such other times as the council may direct.

(c) The treasurer shall be required to give a surety bond satisfactory to the council and the Commissioner of Indian Affairs.

(d) The treasurer shall be present at all meetings of the council unless prevented by circumstances beyond his control.

(e) All checks shall be signed and all vouchers shall be approved for payment by two officers of the tribe as follows: the president or the vice-president, together with the treasurer or, in his absence, the secretary.

(f) In the absence of the president, vice-president, and secretary, the treasurer shall carry on the duties of the president.

SEC. 3. The tribal council may require all responsible tribal officials and employees to be bonded. The premium for the bond shall be paid by the tribe.

ARTICLE XXV—PART III—THE JUDICIARY

SECTION 1. The judicial powers of the Mescalero Apache Tribe shall be vested in the Tribal Courts, including a Trial and Appellate Court. The jurisdiction of the Tribal Courts shall

extend to all matters, criminal and civil, except where prohibited by the Constitution, laws or treaties of the United States of America, and except as such jurisdiction may be otherwise limited from time to time by ordinance of the Tribal Council. (Subject to appr. of Sec. In.)

SEC. 2. The criminal offenses over which the Courts of the Mescalero Apache Tribe have jurisdiction may be embodied in a Code of Laws, adopted by ordinance of the tribal council, and subject to review by the Secretary of the Interior.

SEC. 3. The duties and procedures of the courts shall be determined by ordinance of the tribal council.

ARTICLE XXVI—COMPOSITION OF THE TRIBAL COURTS

SECTION 1. The trial court shall consist of a chief judge and two associate judges, appointed by the President of the Mescalero Apache Tribe, with the concurrence of not less than a three-fourths majority vote of the whole membership of the tribal council.

SEC. 2. The tribal council shall sit as a court of appeals whenever necessary and may hear appeals at any regular or special meeting.

SEC. 3. The tenure and salary of tribal judges shall be established by ordinance of the tribal council.

SEC. 4. No person shall be appointed to the office of tribal judge unless he is an enrolled member of the Mescalero Apache Tribe, not less than 35 years nor more than 70 years of age; nor shall any person be appointed as a tribal judge who has ever been convicted of a felony or, within one year, the last past, of a misdemeanor.

ARTICLE XXVII—INHERENT POWER OF THE MESCALERO APACHE TRIBE

SECTION 1. No provision of this constitution shall be construed as a limitation on the inherent residual sovereign

powers of the Mescalero Apache Tribe. Any such powers, not delegated to the representative tribal government by this constitution, are retained for direct exercise by the people through referendum, as provided for herein, or for exercise by the tribal government following amendment of the constitution.

ARTICLE XXVIII—SAVING CLAUSE AND REPEAL OF PREVIOUS CONSTITUTION

SECTION 1. The Constitution and Bylaws of the Apache Tribe of the Mescalero Reservation, approved on March 25, 1936, under the provisions of Section 16 of the Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378), is hereby repealed and superseded by this constitution.

SEC. 2. All ordinances and resolutions heretofore enacted by the Mescalero Tribal Business Committee shall remain in full force and effect to the extent that they are not inconsistent with this constitution.

SEC. 3. The incumbent tribal business committee and incumbent tribal officers shall remain in office and shall be entitled to exercise all powers granted by this constitution to the tribal council and tribal officers until such time as the first election of the tribal council and tribal officers is held under this constitution.

ARTICLE XXIX—OATH OF OFFICE

SECTION 1. No elective official of the Mescalero Apache Tribe shall be officially installed in the office to which such official is elected unless and until the following oath has been duly administered by a Judge of the Mescalero Apache Tribal Court:

"I, ..., do solemnly swear that I will support and defend the Constitution of the United States against all enemies; that I will faithfully

and impartially carry out the duties of my office, uphold the Constitution of the Mescalero Apache Tribe, and represent the interests of the Mescalero Apache people. These things I will do to the best of my ability, so help me God."

ARTICLE XXX—RATIFICATION OF REVISED CONSTITUTION

SECTION 1. This constitution, when adopted by a majority vote of the qualified voters of the Mescalero Apache Tribe, voting at an election called for that purpose by the Secretary of the Interior, in which at least thirty percent (30%) of those entitled to vote shall cast their ballots, shall be submited to the Secretary of the Interior for his approval, and shall be effective from the date of approval.

CERTIFICATION OF ADOPTION

Pursuant to an election authorized by the Secretary of the Interior on December 11, 1964, the attached Revised Constitution of the Apache Tribe of the Mescalero Reservation was submitted to the qualified voters of the tribe and was on December 18, 1964, duly adopted by a vote of 190 for and 103 against, in an election in which at least 30 percent of the 635 members entitled to vote cast their ballot in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), as amended by the Act of June 15, 1935 (49 Stat. 378).

KENNETH L. PAYTON
Chairman, Election Board

CHRISTIE LA PAZ
Election Board Member

ALTON PESO
Election Board Member

APPROVAL

I, John A. Carver, Jr., Under Secretary of the Interior of the United States of America, by virtue of the authority granted me by the Act of June 18, 1934 (48 Stat. 984), as amended, do hereby approve the attached Revised Constitution of the Apache Tribe of the Mescalero Reservation.

Approval recommended:

JAMES E. OFFICER
Associate Commissioner
Bureau of Indian Affairs

JOHN A. CARVER, JR.
Under Secretary of the Interior
[SEAL]

WASHINGTON, D.C., *January 12, 1965*

Plaintiff's Exhibit No. 29

AGREEMENT BETWEEN BUREAU OF SPORT FISHERIES AND WILDLIFE OF THE U. S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, AND THE APACHE TRIBE OF THE MESCALERO RESERVATION

THIS AGREEMENT made this 13th day of April 1959 between the UNITED STATES OF AMERICA, Bureau of 'Sport Fisheries and Wildlife, Fish and Wildlife Service, Department of the Interior acting by its authorized representative, hereinafter called the Bureau, and the Apache Tribe of the Mescalero Reservation, an Indian tribe and a corporation organized and existing under the Act of June 18, 1934, 48 Stat. 984, as amended, hereinafter called the Tribe.

WHEREAS, the waters of the Mescalero Reservation provide a potential for the development and maintenance of fishery resources.

WHEREAS, the development and maintenance of the fishery resources will provide recreation to Tribal members and the public.

WHEREAS, the fishery resources are a source of economic return to the Tribe and its members through the providing of goods and services to the public who will enjoy this resource.

WHEREAS, the Bureau of Sport Fisheries and Wildlife through laws and agreements is responsible for providing assistance in the management of fisheries in areas of Federal interest including Indian Reservations as set forth in the Memorandum of Understanding between the Fish and Wildlife Service and the Office of Indian Affairs dated August 7, 1941.

NOW, THEREFORE, it is agreed:

1. The Bureau will provide technical assistance in the management and development of fishery resources of Reservation waters.

2. The Bureau will provide for stocking Reservation waters. The numbers, size, and species will be determined by Bureau biologists. Stocking program will be based upon biological requirements, fishing pressure, and availability of fish.

3. The Tribe will designate those waters of the Reservation which shall be open to public fishing and the waters so designated shall receive first priority for bureau assistance outlined in sections 1 and 2 above.

4. The Tribe will establish regulations for the conservation of the fishery resources. Insofar as possible said regulations shall be in agreement with State regulations.

5. Employees of the Bureau while carrying out the activities set forth herein shall at any time have access to Reservation waters and may conduct biological investigation in such manner as the Bureau may determine to be necessary.

6. The Bureau will provide the Tribe with reports of its activities on the Tribal Reservation waters at least once each year.

7. This agreement shall be in force and effect for two years following the date of execution and shall continue in effect each year thereafter unless cancelled by either party. Said cancellation shall be in writing and submitted at least 90 days prior to the annual renewal date.

8. In fulfilling the terms of this agreement, the cooperating agencies shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin and shall require an identical provision to be included in all sub-contracts.

9. Pursuant to the requirements of section 22 of Title 41 of the United States Code, it is an express condition of this agreement that no Member of or Delegate to Congress, or any Resident Commissioner, shall be admitted to any share or part of this agreement, or to any benefit to

arise therefrom, unless the agreement is made with a corporation for its general benefit.

10. This agreement is made contingent on the availability of funds for the expenditures contemplated hereunder. In case such funds as may be necessary to carry out the terms of this agreement are not available, the respective parties are released from liability hereunder to the extent that such funds are not available.

CONCURRED:

/s/ JOHN C. GATLIN
Regional Director

/s/ CLINTON O. FALLEY
Superintendent

/s/ VIRGINIA KLINEKOLE
Tribal Chairman

AN AMENDMENT TO THE AGREEMENT BETWEEN BUREAU OF SPORT FISHERIES AND WILDLIFE OF THE U.S. FISH AND WILDLIFE SERVICE, DEPARTMENT OF THE INTERIOR, AND THE APACHE TRIBE OF THE MESCALERO RESERVATION

Section 2 of the Agreement between Bureau of Sport Fisheries and Wildlife of the U.S. Fish and Wildlife Service, Department of the Interior and the Apache Tribe of the Mescalero Reservation dated 13th day of April 1959 is hereby amended by adding the following:

> "Whenever possible the Tribe will assist in the distribution of fish in accordance with the stocking program. The Bureau will provide such equipment for the purpose as it may have available."

CONCURRED:

/s/ HERBERT A. JOHNSON
Superintendent
Date 7-7-61

/s/ JOHN A. GATLIN
Regional Director
Date 7/10/61

/s/ FRED PELLMAN
Tribal Chairman
Date 7-7-61

Plaintiff's Exhibit No. 31

MESCALERO APACHE TRIBE
MESCALERO, NEW MEXICO

ORDINANCE NO. 77-1

Pursuant to Article 11, Section 1 (c) of the Revised Constitution of the Mescalero Apache Tribe and pursuant to 18 U.S.C. 1165 (added Pub. L. 86-634, Section 2, July 12, 1960, 74 Stat. 469) the Tribal Council of the Mescalero Apache Tribe is authorized to adopt ordinances for the protection and preservation of property, wildlife, and natural resources of the Tribe. The Tribal Council of the Mescalero Apache Tribe hereby adopts the following ordinance pertaining to hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation to provide such preservative and protection of its wildlife.

1. Except for enrolled members of the Mescalero Apache Tribe, no person shall hunt or fish within the exterior boundaries of the Mescalero Apache Reservation without having in his or her possession the appropriate license issued by the Tribe. No state license of any kind shall be necessary for any person. License fees shall be established by the Tribal Council.

2. No person shall hunt or fish within the exterior boundaries of the Mescalero Apache Reservation except at such times as may be provided by the Tribal Council.

3. No person shall take any game in quantities exceeding those established by the Tribal Council.

CERTIFICATION

The foregoing enactment of the Mescalero Apache Tribal Council is duly adopted and approved on January 14, 1977 at a legally called session of the Mescalero Apache Tribal Council, at which a quorum was present and at which a majority of the members voted in favor thereof. This enacement is approved by the President of the Mescalero Apache Tribe under authority of Article XII, Section 1, of the Revised Constitution.

/s/VIRGINIA KLINEKOLE

Virginia Klinekole, Secty
Pro Tempore

/s/WENDELL CHINO

Wendell Chino, President

Plaintiff's Exhibit 32

MESCALERO APACHE TRIBE
Mescalero, New Mexico
ORDINANCE NO. 77-7

WHEREAS, Ordinance No. 77-1 of the Mescalero Apache Tribe provides that the Tribal Council shall establish hunting and fishing seasons, bag limits and license fees for persons hunting and fishing on the Mescalero Apache Reservation to ensure the protection and preservation of property, wildlife and natural resources; and

WHEREAS, The Tribal Council is authorized to take this action pursuant to its Revised Constitution;

NOW, THEREFORE, the following provisions are hereby adopted for the period May 1, 1977 to April 30, 1978.

MESCALERO APACHE HUNTING AND FISHING PROCLAMATION

Mescalero, New Mexico
1977

Pursuant to Ordinance No. 77-1 of the Mescalero Apache Tribe, the Tribal Council hereby adopts the following rules and regulations governing hunting and fishing on the Mescalero Apache Reservation.

I.

HUNTING REGULATIONS:

A. Season, bag limits and license fees:

1. Enrolled members of the Mescalero Apache Tribe, (including minors 16 years of age or older adopted by non-Mescalero families).

a. Deer and Turkey: Tribal members may hunt deer and turkey of either sex, August through December 1977. There are no bag limits and no fees or licenses required.

b. Bear: No restrictions on the season and no bag limits or fees or license required.

c. Elk: 50 license shall be issued to tribal members as follows: 10 bull license and 40 cow license with a bag limit of 1 bull with at least 5 points on at least one antler or one mature cow. Season shall be September 25 through October 10, 1977.

License shall be issued on a drawing basis for bulls and cows. Only the head of the family is eligible for the drawing and tribal members who drew elk license during the 1973, 1974, 1975 or 1976 elk hunts will not be eligible for the 1977 hunt. The cost of each elk license is $40.00. Allowable caliber and bullet weights for elks:

Caliber:	Bullet Weight:
6.5 MM (.265)	140 gr.
.270	150 gr.
.7 MM	150 gr.
.30	180 gr.
.388 or larger	210 gr.

d. Antelope: 15 buck and 15 doe license will be issued. The season shall be September 10 through September 14, 1977, inclusive. Bag limit—1 buck or 1 doe. License will be issued on a drawing basis (only the head of the family is eligible for the drawing). License will cost $10.00. The hunting area is restricted to Dead Man, Red Lake, and Spur Pasture area (see attached map for hunting area). Tribal members who drew antelope

license during the 1974, 1975 or 1976 tribal hunts will not be eligible for the 1977 antelope hunt.

2. Employees of the Mescalero Apache Tribe, tribal-affiliates and non-Indian federal government law enforcement personnel.

   a. The season for all game for which hunting is allowed for the above-referenced persons shall be November 5 through 13 of 1977, inclusive.

   b. Bag limit and license fees:

      (1) Deer and turkey—one deer and turkey of either sex. One license shall be issued to cover both deer and turkey. The cost shall be $45.00 except for affiliates for whom there shall be no fee.

      (2) Bear—1 Bear. License is $30.00 and tribal affiliates are not eligible.

      (3) Elk—None allowed.

      (4) Antelope—None allowed.

   c. Employee license are available to employees of BIA-Mescalero Agency; PHS Hospital; Bent Mescalero School employees; Mescalero National Fish Hatchery; Mescalero Apache Tribe (limited to 3 permanent employees of the Inn of the Mountain Gods and 3 permanent employees of the Ski Area, said employees to be selected by management of each respective enterprise); Cattle Growers, Inc. Only the employee family will be eligible for the one employee license. There will be a $60.00 charge for an additional license for an immediate dependent, who must be 16 years of age or older.

   d. Hunting by tribal employees shall be restricted to the east side of the reservation.

e. All tribal affiliates must have their spouse accompany them during any hunting period. Violation of this regulation can result in the suspension of all hunting privileges for a year and a quarter.

f. Tribal affiliate for purposes of the proclamation shall include all non-members married to enrolled members of the Mescalero Apache Tribe and non-members who have adopted minor members of the Mescalero Apache Tribe living in their home for a period of at least one year preceeding issuance of permit.

g. One permit will be given to each Church. The head of the Church shall designate one recipient of the permit.

3. General Public.

1977 PUBLIC HUNTS
MESCALERO APACHE RESERVATION

	ANTELOPE	BEAR:	BULL ELK- (Package Hunt)*
Date:	Aug. 29—Sept. 2	Sept. 6-14	Sept. 23-28 Sept. 30-Oct. 5
Bag Limits:	1 Buck	1 Bear (No Cubs)	1 Bull w/five points on one antler 1 Bear (No Cubs)
Hunt Area:	Deadman, Red Lake & Spur Well Pastures	All Revervation	All Reservation
No. Permits:	10	25 w/o Dogs	50 Bulls** 50 Bear**
Price:	$500.00	$100.00 w/o Dogs	$2000.00
Other:	Check in & Out	Guides Required Check in & Out	Check in & Out at the Conservation Office at the Inn of the Mountain Gods.

* A Package Hunt sold at the Inn of the Mountain Gods will be offered for 50 Bull Elk-Bear permits and 100 Mule Deer permits.

** 25 Bull permits and 25 Bear permits will be issued each week for the above two weeks.

*** 25 Deer permits will be issued each week for the above weeks.

	MULE DEER: (Package Hunt)*	MULE DEER
Date:	Oct. 24-27 Oct. 31-Nov. 3 Nov. 7-10 Nov. 14-17	Nov. 26-Dec. 11
Bag Limits:	1 Buck, 1 Doe and Fishing	1 Buck & 1 Doe
Hunt Area:	All Reservation	All Reservation
No. Permits:	100***	150
Price:	$600.00	$200.00
Other:	Check in and out at the Conservation Office at the Inn of the Mountain Gods	Check in and out at the Conservation Office.

* A Package Hunt sold at the Inn of the Mountain Gods will be offered for 50 Bull Elk-Bear permits and 100 Mule Deer permits.

** 25 Bull permits and 25 Bear permits will be issued each week for the above two weeks.

*** 25 Deer permits will be issued each week for the above weeks.

B. General Provisions Applicable to All Persons:

1. It is illegal for non-hunters to haul or accompany Indian hunters around the Reservation to hunt. Any person violating this provision shall be fined $100.00.

2. It is illegal to use artificial light in connection with hunting any game animal. Any person violating this provision shall be fined *$300.00.*

3. Any person killing an elk without a license to do so shall be fined $1,000.00 and shall forfeit the trophy and meat.

*4. Any person killing a bear without a license to do so shall be fined *$300.00* and shall forfeit the trophy and meat.

*5. Any person killing a deer without a license to do so shall be fined *$150.00* and *$300.00* for second offense and shall forfeit the trophy and meat.

6. Any person killing a turkey without a license to do so shall be fined $150.00 and $300.00 for second offense and shall forfeit the trophy and meat.

7. Any person killing other game without a license to do so shall be fined $150.00 and shall forfeit the trophy and meat.

8. All persons violating any provision of this proclamation relating to hunting shall be subject to the jurisdiction of the tribal court.

9. The sale or barter of any portion of a game carcass is strictly prohibited. Penalty $300.00 fine.

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* Does not apply to Tribal members

C. No complimentary permit will be issued by anyone without approval of the Mescalero Apache Tribal Council.

FISHING REGULATIONS:

A. Enrolled members of the Mescalero Apache Tribe are not required to procure licenses and are not subject to area, seasonal or catch limits. All other persons are subject to the following:

1. Legal areas, season, catch limits and fees:

a. Ruidoso Recreation Area and Eagle Creek Recreation Area:

Opening Date: May 14, 1977
Closing Date: September 11, 1977

Fees:

Fishing:	$2.00 Adult—12 catch limit per day; $1.00 Child—6 catch limit per day; (under 14 years of age)
Overnight:	$2.50 first 2 persons + .50 each additional person.
Picnic:	$2.00/car or .50 per person in bus.

b. Silver Springs:

Opening Date:	May 14, 1977
Closing Date:	To be posted (generally open until lake freezes)

Fees:

Fishing:	$2.00 Adult—12 catch limit per day; $1.00 Child—6 catch limit per day; (under 14 years of age)
Overnight:	$5.00 first two persons + .50 each additional person.
Picnic:	$2.00 per car or .50 per person in bus.

(Overnight camping includes trailer hookups with water, sewer and electricity at Silver Springs).

NO RESERVATIONS ARE NECESSARY FOR OVER-NIGHT CAMPING—SERVICE IS ON A FIRST COME —FIRST SERVED BASIS.

c. Licenses issued for other areas or lakes are NOT valid at Lake Mescalero or Cienigita Lake. Special permits are required to fish at those two lakes.

Lake Mescalero and the Cienegita Lakes Recreation Area are facilities of the Inn of the Mountain Gods and permits for fishing are available at the Inn.
No picnicking is permitted on Lake Mescalero and no camping is permitted at Lake Mescalero or Cienegita Lake.

Cienegita Lake opens May 20, 1977 and closes October 31, 1977.

Lake Mescalero is open year round.

Fees at either or both lakes:

	Guest Adult	Guest Child	Non-Guest Adult	Non-Guest Child
Fishing:	$5.00	$2.50	$7.00	$3.50
Catch Limit Per Day.....	12	6	12	6
Picnic:	—Guests Free—		$2.00 per car first two persons + .50 each additional person at Cienegita Lake Only.	

2. Season Permits, affiliates and Employee Licenses:

a. Affiliates may receive a free license at Mescalero Tribal Offices. However, affiliates must have the license in their possession at all times when fishing.

b. A season permit for fishing only, valid for entry and use at the above three recreation

areas, is available to the general public for a fee of $35.00 at the Mescalero Tribal Office. The permit does not include the fee charged for picnic area usage or camping.

c. Employees license are available to employees of BIA-Mescalero Agency; PHS Hospital; Bent Mescalero School Employees; Mescalero National Fish Hatchery; Mescalero Apache Tribe (including the Ski Area and Inn of the Mountain Gods); Cattle Growers, Inc. Only the employee family will be eligible for the one employee license. There will be a fee of $25.00. The License does not include the fee charged for picnic area usage or camping. Daily fees are collected at the gate of each Recreation Area and permits are valid only at the area where fee is collected.

3. It shall be unlawful for any person to:

a. Have more than one line in the water per licensed fisherperson.

b. Use any boats, rafts, canoes or other flotation equipment at any time.

c. Fish on any other waters of the Mescalero Indian Reservation EXCEPT as specifically set forth therein and EXCEPT for areas in which concessionaries are authorized to issue permits.

d. Fish with more than one pole while angling in all trout waters.

e. Deposit litter in or pollute any waters or the bank of such waters.

f. Leave a campfire burning and unattended.

g. Leave any fishing pole or hand line unattended.

h. Snag, net, seine, trap, grapple or otherwise catch fish.

B. Jurisdiction, Fines and Penalties:

1. Any person violating any provision of this proclamation relating to fishing shall be fined a minimum of $25.00.

2. Any person violating any provision of this jurisdiction relating to fishing shall be subject to the jurisdiction of the tribal court.

3. Any person who has in his possession more fish than legally permitted shall forfeit all of his catch then in his possession and shall pay a fine of $25.00 per fish in excess of the limit.

C. No complimentary permits will be issued by anyone without approval of the Mescalero Apache Tribal Council.

NOTE: THE STATE OF NEW MEXICO AND THE MESCALERO APACHE TRIBE ARE PRESENTLY INVOLVED IN A CONTROVERSY REGARDING THE ISSUE OF WHETHER OR NOT A NEW MEXICO HUNTING OR FISHING LICENSE IS REQUIRED OF A NON-INDIAN IN ORDER TO HUNT OR FISH ON THE MESCALERO RESERVATION. THE TRIBE MAINTAINS THAT NO STATE LICENSE IS NECESSARY, BUT ACCEPTS NO RESPONSIBILITY FOR ANY CONSEQUENCES WHICH MAY BE SUFFERED BY REASON OF FAILURE TO OBTAIN A STATE LICENSE. CURRENT INFORMATION REGARDING THIS CONTROVERSY IS AVAILABLE AT TRIBAL OFFICES, MESCALERO, NEW MEXICO 88340.

CERTIFICATION

The foregoing enactment of the Mescalero Apache Tribal Council was duly adopted and approved on June 17, 1977, at a legally called session of the Mescalero Apache Tribal Council, at which a quorum was present and at which a majority of the members voted in favor thereof. This enactment is approved by the President of the Mescalero Apache Tribe under authority of Article XII, Section 1, of the Revised Constitution.

'S/ KEITH MILLER
'S/ WENDELL CHINO

Keith Miller, Secretary
Wendell Chino, President

Plaintiff's Exhibit No. 39

1977 PUBLIC HUNTS
MESCALERO APACHE RESERVATION

Conservation Office Mescalero Apache Tribe P.O. Box 176
Mescalero, NM 88340

Antelope	Bear	Mule Deer	Package Hunt* Bull-Elk	Package Hunt* Mule Deer
August 29- September 2	Sept. 6-14	November 26- December 11		
Bag limit: 1 buck	Bag limit: 1 bear (no cubs)	Bag limit: 1 buck & 1 doe	*FOR PACKAGE - HUNT Contact: Mark W. Daniels The Inn of the Mountain Gods P.O. Box 259 Mescalero, New Mexico 88340 Phone: 505-257-5141	
Hunt area: Deadman, Red Lake, Spur Well Pastures	Hunt area: All Reservation	Hunt area: All Reservation		
Permits: 10	Permits: 25 (w/o dogs)	Permits: 150		
Price: $500.00	Price: $100.00 (w/o dogs)	Price: $200.00		
Other: Check in & out	Other: Guides required Check in & out	Other: Check in & out at Mescalero Conservation Office.		

GENERAL PROVISIONS APPLICABLE TO ALL PERSONS:

1. It is illegal for non-hunters to haul or accompany Indian hunters around the Reservation to hunt. Any person violating this provision shall be fined $100.00.

2. It is illegal to use artificial light in connection with hunting any game animal. Any person violating this provision shall be fined $300.00.

3. Any person killing an Elk without a license to do so shall be fined $1000.00 and shall forfeit the trophy and meat.

4. Any person killing a bear without a license to do so shall be fined $300.00 and shall forfeit the trophy and meat.

5. Any person killing a deer without a license to do so shall be fined $150.00 and $300.00 for second offense and shall forfeit the trophy and meat.

6. Any person killing a turkey without a license to do so shall be fined $150.00 and $300.00 for second offense and shall forfeit the trophy and meat.

7. Any person killing other game without a license to do so shall be fined $150.00 and shall forfeit the trophy and meat.

8. All persons violating any provision of this proclamation relating to hunting shall be subject to the jurisdiction of the tribal court.

9. The sale or barter of any portion of a game carcass is strictly prohibited. Penalty: $300.00 fine.

Hunt Permit Application
Mescalero Apache Reservation

Conservation Department (505-671-4427)

Mescalero Apache Tribe
P.O. Box 176
Mescalero, New Mexico 88340

Name _____

Address _____

_____

Bus. Ph. _____ Home Ph. _____
Driver's Lic. No. _____
Vehicle Lic. No. _____
Vehicle Description _____
Make Year
Color
Emergency contact _____
Emergency Phone _____
Applicant Description:
Soc. Sec. No. _____ Sex ____
Height ____ Weight ____ Hair ____ Eyes ____
Birthdate _____

Antelope August 29—Sept. 2
( ) $500.00

Bear Sept. 6—Sept. 14
( ) $100.00
Mule Deer Nov. 26—Dec. 11
( ) $200.00
Calibre of Firearms _____

The above seasons are processed through the Mescalero Conservation Department. For package hunts, contact the Inn of the Mountain Gods (505-257-5141)
Mule Deer package hunt: $600.00
Bull Elk package hunt: $2000.00

+ + + + + + + + +

While on the Mescalero Apache Reservation I promise to abide by all rules and regulations of the Mescalero Apache Tribe, or will be subject to prosecution for violations. It is further understood that violation of game regulations will result in prosecution.

_____
Applicant Signature

_____
Date

Enclose Cashier's Check, Certified Check or Money Order, payable to the *Mescalero Apache Tribe*, in amount to cover permits requested. (No personal checks, but cash will be accepted in person.)

IMPORTANT

The State of New Mexico and the MESCALERO APACHE TRIBE are presently involved in a controversy regarding the issue of whether or not a New Mexico hunting or fishing license

is required of a non-Indian in order to hunt or fish on the Mescalero Reservation. The Tribe maintains that no State license is necessary, but accepts no responsibility for any consequences which may be suffered by reason of failure to obtain a State license. Current information regarding this controversy is available at Tribal Offices, Mescalero, New Mexico 88340

Plaintiff's Exhibit No. 42

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Albuquerque Area Office
P.O. Box 8327
Albuquerque, New Mexico 87108

Memorandum November 7, 1977

To: Superintendent, Mescalero Agency
From: Area Director
Subject: Tribal Ordinances Nos. 77-1 and 77-7

The Mescalero Apache Tribal Council on January 14, 1977 adopted Ordinance No. 77-1 pertaining to hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation. Ordinance No. 77-7 is the related enactment providing for specific regulations regarding hunting and fishing.

For some unexplained reason, no action was taken on these documents by this office. However, we now have reviewed the ordinances and find no objections to their contents. We find these to be legally sufficient and in conformity with the tribe's Revised Constitution.

Pursuant to the delegated authority of the Area Director, Ordinances No. 77-1 and No. 77-7 are hereby approved effective January 14, 1977.

/s/ LOYD E. NICHOLSON
Acting Area Director

Plaintiff's Exhibit 43

The Apache Tribe of the Mescalero Reservation

P.O. Box 176
Mescalero, New Mexico 88340

April 25, 1969

New Mexico Department of Game & Fish
Santa Fe, New Mexico

Dear Sir:

The Mescalero Apache Tribal Council has encountered several unauthorized parties on the Mescalero Reservation performing surveys, explorations, and other activities without the permission of the Mescalero Apache Tribal Council.

Each time that this happens, it appears that there has been a breakdown in communications between the agency in trespass and the Mescalero Apache Tribal Council.

The purpose of this letter is to inform your agency that permission must be secured in advance from the Mescalero Apache Tribal Council President before any members of your agency enter into the Mescalero Apache Tribal Reservation, for any reason whatever. Permission is generally granted when there is a good reason for your agency to pursue your activities on the Mescalero Apache Reservation.

In order to avoid future misunderstandings, will you kindly secure a permit from the Tribal President. The permit will state the nature of your business, the general area you will be in while on the Reservation, and the time required to perform your mission.

Yours very truly,

/s/ WENDELL CHINO,

Wendell Chino, *President*
Mescalero Apache Tribal Council

Plaintiff's Exhibit No. 44

State of New Mexico

DEPARTMENT OF GAME AND FISH
STATE CAPITOL
SANTA FE
87501

July 14, 1969

Mr. Wendell Chino, President
Mescalero Apache Tribal Council
P. O. Box 176
Mescalero, New Mexico 88340

Dear Mr. Chino:

Reference is made to your letter of April 25, 1969, directed to this Department and concerning the entry of our personnel on the Mescalero Reservation for purposes of performing game and fish management work in cooperation with tribal officials.

While I recognize that your letter was not specifically aimed at our Department or field personnel, I feel that I must have more specific information from you in order that we may avoid any possible conflict and hopefully continue the fine cooperation which has existed between the Mescalero Tribal Council and our Department in past years.

I want to assure you that we recognize the absolute authority of the Tribal Council in denying entry on the Reservation for wildlife management or wildlife law enforcement purposes. I am sure, however, that you recognize that our Department and field personnel have always cooperated closely with tribal officials and that we would find it impossible to continue this type of close cooperation if our entry onto the Reservation is in any way restricted. I know that you will remember our efforts in behalf of the Mescalero Tribe in working out arrangements for elk plantings on the Reservation. We want to continue this type of close cooperation but, at this particular point, I am uncertain as to your wishes in this regard.

I would appreciate your reviewing your April 25 letter and advising me more specifically of your intent in this respect.

Very truly yours,

/s/LADD S. GORDON

Director

BC: Phil Freeman
Marion Embrey
Charles Cockerell
Jim Peckumn
Doug C. Robinson, BIA, Albuquerque

R

B.1 [illegible]
[illegible]

Treaty with the Mescalero Apaches, of the 14th June 1855; in three Articles

THE NATIONAL ARCHIVES
Washington, D. C.

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the Mescalero Apache, signed at Fort Thorn in the Territory of New Mexico on June 14, 1855. (No. [illegible] Unratified)

A -

Articles of Agreement and Convention made and concluded at Fort Thorn, in the Territory of New Mexico, this 14th day of June one thousand eight hundred and fifty four by Brevet Major [illegible] duly appointed for that purpose on the part of the United States, and the undersigned Chiefs, Captains and Head men of the Mescalero Apache tribe or nation of Indians, they being duly authorized and acting for and in behalf of their respective bands.

Article 1st There shall be perpetual peace, friendship and amity between the United States of America and the Mescalero Apache tribe or nation of Indians, and this convention, and every article and stipulation thereof, shall be perpetual, and observed and performed in good faith.

Article 2nd The Mescalero bands of the Apache tribe of Indians do hereby severally and upon their personal obligations, that peaceful relations shall be maintained amongst themselves, and all the bands, tribes and nations of Indians within the United States, and that they will abstain from committing hostilities or depredations in future, and cultivate mutual good will and friendship.

Article 3rd The Mescaleros hereby cede, and forever relinquish to the United States, all title or claim whatsoever, which they have or ever have had to lands on the East side of the Rio Grande, together, with all other lands within the Territory of New Mexico, except, so much as is hereinafter reserved to them. And the Mescaleros further agree and bind themselves to remove to and settle on the lands reserved to them within one month after the date of this instrument, without any cost or charge to the United States whatever for their removal; and that they will cultivate the soil, and raise flocks and herds for a subsistence, and that the President may withhold the annuities herein stipulated to be paid, or any part thereof, should the Indians shall violate, fail or refuse to comply with any provision of this instrument, or to cultivate the soil in good faith.

Article 4th The United States agree to and grant and withhold from sale, for the use of the Mescaleros for their permanent homes, and hereby guarantee to them the possession and enjoyment of a tract of Country within that portion of the Territory of New Mexico now claimed by the Mescaleros to be bounded as follows to wit: beginning at the most southern point of the Rey Canon - thence running due west fifteen miles, thence North to a point equi distant between the Sabinoso and Galinoso Creeks - thence East to the Pecos river, thence down said river to a point

THE NATIONAL ARCHIVES
Washington, D. C.
These certificates

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the [illegible] Apache, signed at Fort Thorn in the Territory of New Mexico on June 14, 1854 (No. 97a, Treaties).

East of the beginning, thence West to the beginning - and the United States are hereby authorized to define the boundaries of the reserved tract, whenever it may be necessary by actual survey, and the President may, from time to time, at his discretion, extend the whole or any part thereof, to be surveyed, and may assign to each head of a family or single person over twenty one years of age, twenty acres of land for his or her separate use and benefit, and to each family of three and not more than five persons, forty acres; and to each family of five or more persons, sixty acres; and he may at his discretion, as fast as the occupant becomes capable of transacting their own affairs issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose, and he may also at his discretion, make rules and regulations, respecting the disposition of the lands in the case of the death of the head of a family or single person, occupying the same, or in case of it's abandonment by them - and he may also assign other lands in exchange for mineral lands, if any such are found in the tract herein set apart - And he may also make such changes in the boundaries of such reserved tracts as shall be necessary to prevent interference with any vested rights - All necessary roads, highways and railroads, the lines of which may run through the reserved tract shall have the right of way through the same, compensation being made therefor, as in other cases: but, the President may grant the right of way to any such roads free of charge.

Article 5th In Consideration of, and full payment for the Country ceded, and the removal of the Mescaleros, the United States agree to pay to the Mescaleros the following sums without interest, to wit; The United States will during the years 1856, 1857 and 1858, pay to the Mescaleros six thousand dollars each year, during the year 1859, and the ten next succeeding years thereafter, a sum of four thousand each year; and during the year 1869 and the next succeeding twenty years thereafter, the sum of two thousand dollars each year.

All of which annual sums of money shall be paid to the Mescaleros or expended for their use and benefit under the direction of the President of the United States, who may from time to time, determine, at his discretion what proportion of the annual payments in this article provided for, if any, shall be paid to them in money, and what proportion shall be appl

THE NATIONAL ARCHIVES
Washington, D. C.

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the Mescalero Apache, signed at Fort Thorn in the Territory of New Mexico on June 14, 1855. (No. 374-A, Unratified)

Terms Conditions

to and expended, for their moral improvement and education, for such benificial objects as in his judgment will be calculated to advance them in civilization, for building, opening farms, breaking lands, providing stock, agricultural implements, seeds &c, for employing farmers, to teach the Indians to cultivate the soil, for clothing, provisions and merchandize, for iron, steel, arms and ammunition, for mechanics and tools, and for medical purposes.

Article 6th The annuities of the Indians, shall not be taken to pay the debts of individuals, but satisfaction for depredations, committed by them, shall be made by the Indians in such manner, as the President may direct. Nor shall any part of the amounts stipulated to be paid, ever be applied by the chiefs or head men to the payment of tribal debts or obligations, to traders or other persons.

Article 7th No spirituous liquors shall be made, sold or used on any of the lands set apart for the residence of the Indians, and the sale of the same, shall be prohibited, in the Territory hereby ceded, until otherwise ordered by the President.

Article 8th The laws now in force or which may hereafter be enacted by Congress for the regulation of trade and intercourse with the Indian tribes, shall continue and be in force within the Country set apart for the use of the Mescaleros and such portions of said laws as prohibit the introduction, manufacture, use of and traffic in ardent spirits, in the Indian Country, shall continue and be in force in all the Country ceded, until otherwise provided by law.

Article 9th The Mescaleros do hereby agree and bind themselves to make restitution or satisfaction, for any injuries done by any band or individual, to the people of the United States, and to surrender to the proper authorities of the United States, when demanded, any individual or individuals, who may commit depredations, to be punished according to law. And if any citizen of the United States shall at any time commit any depredation upon the Indians - the Mescaleros agree, that they will not take private revenge or satisfaction themselves - but instead thereof, they will make complaint to the proper Indian Agent for redress. And the said Indians further agree, to refrain from all warlike incursions into the Mexican provinces, and from committing depredations upon the inhabitants thereof.

Article 10th This treaty shall be obligatory on the contracting parties as soon

RECORD GROUP NO. 11, GENERAL RECORDS OF THE UNITED STATES GOVERNMENT. Treaty between the United States and the Mescalero Apache, signed at Fort Stanton in the Territory of New Mexico on June 14, 1855 (No. 374-A, Unratified).

THE NATIONAL ARCHIVES Washington, D. C.

Indian Treaties

as the same shall be ratified by the President and Senate of the United S

In testimony whereof, the said David Meriwether Commissioner as a
said, and the undersigned Chiefs of the said tribe of Kansas Indians
set their hands and seals, at the place and on the day and year herein
written.

Witnesses: D. Meriwether [illegible]

Richard G. Ewell [illegible] on the part of the United
Captain 1st Dragoons
A. C. Steele
D.M.I.A.
Saml. Ellis Boyd
Interpreter
Estevan Ochoa
Interpreter
M. Steck
Ind Agent

Carranguita his mark
Plumas his mark
Vuelto his mark
Vieja his mark
Copas his mark
Lorette his mark
Manuelito his mark
Monte his mark
Bodita his mark
Monchito his mark
Francisco his mark
Romulo his mark
Jose Largo his mark
Estrellita his mark
Manuelito his mark
Mariano his mark
Francisco his mark

THE NATIONAL ARCHIVES
Washington, D. C.

[illegible] NO. 11, [illegible] OF THE UNITED STATES [illegible]
[illegible] between the United States and the
[illegible] Article, signed at Fort Dixon in the Territory
[illegible] June 14, 1[illegible] (Ind. Treaty, Unratified.).

STATE OF NEW MEXICO

Office of the Attorney General

DEPARTMENT OF JUSTICE
P. O. Box 2246
Santa Fe, New Mexico 87501

November 6, 1972

Mr. Ladd S. Gordon
Director
Department of Game & Fish
Villagra Building
Santa Fe, New Mexico 87501

Re: Enforcement of Game Laws on The
Mescalero Apache Reservation

Dear Ladd:

This letter will serve to confirm our telephone conversation last Thursday in regard to the above matter.

Attached you will find a copy of a letter, dated October 10, 1972, written to Nando Mauldin which sets out the current law on this matter. Also attached you will find a copy of the case referred to in the letter, *State v. Warner*, and a copy of Attorney General Opinion No. 6041 dated November 22, 1954 which pertains to this matter also. Furthermore, attached you will find a copy of Public Law 280 (18 U.S.C.A. 1162). As I stated to you, Public Law 280, for a given period of time, allowed states to take over jurisdiction of offenses committed by or against Indians on reservations within their states. New Mexico did not take advantage of this situation and pass the necessary enabling legislation. However, you will note that the New Mexico Supreme Court, in the case of *State v. Warner*, did not deem that it was necessary for New Mexico to enact such legislation in order to have control over criminal offenses committed by non-Indians on Indian country.

If you have any further questions in this regard please do not hesitate to contact me. Also, please keep me posted on the situation with the Mescaleros as it develops.

Very truly yours,

JAMES H. RUSSELL, JR.

Assistant Attorney General

STATE OF NEW MEXICO

Office of the Attorney General

DEPARTMENT OF JUSTICE
P. O. Box 2246
Santa Fe, N. M. 87501

October 10, 1972

Nando Mauldin
New Mexico Department of Game and Fish
Villagra Building
Santa Fe, New Mexico 87501

Re: Enforcement of Game Laws on Indian Lands

Dear Nando:

Please refer to our phone conversation of October 2, 1972 wherein you stated the following facts:

You were informed that there were individuals dove hunting on the Santa Clara and San Ildefonso Indian Pueblos after hunting hours. You stated that you went to one of the Pueblos and parked on the highway right-of-way and observed an individual hunting after hours, and in fact, after the season had closed since it was the last day of the season. You stated that you arrested the individual and charged him. Then, you said that an Indian sheriff from the Pueblo came by and stated that you had no jurisdiction upon their lands and that he told the individual he would be available to testify to this effect when the individual appeared before a Magistrate. You also state that you, as well as many of the Game and Fish Wildlife Conservational officers, have both Federal and BIA commissions. You asked whether or not you were properly acting at the time that you arrested the individual.

I would refer you to the case of *State v. Warner*, 71 N.M. 418, 379 P.2d 66, (a copy of which is attached hereto). In that case New Mexico Supreme Court held that State courts have jurisdiction over non-Indians' criminal offenses committed on

Indian reservations but not against an Indian and not involving Indian property. Therefore, since the wildlife involved was not Indian property and no Indian was involved, you would be within your rights to arrest the individual under the circumstances set out above.

I hope that this answers your question. However, if there is anything further I can do for you in this regard please do not hesitate to contact me.

Very truly yours,

JAMES H. RUSSELL, JR.

Assistant Attorney General

STATE OF NEW MEXICO

Department of Justice

Office of the Attorney General
Santa Fe

January 6, 1958

Mr. Homer C. Pickens
Director of Game and Fish
Santa Fe, New Mexico

Re: Mescalero Deer Hunt

Dear Homer:

This is in response to your office memorandum of January 2 concerning alleged violations of law in regard to the subject deer hunt.

Your file reveals that the violations, if such occurred, were committed by non-Indian employees of the Mescalero Apache Indians. This is to say that our office is in agreement with the conclusion reached in the letter of Mr. William A. Brophy, by Mr. Thomas O. Olson, dated July 8, 1955.

While the case of In Re Blackbird, 109 Fed. 139, held that state authorities have no jurisdiction to enforce the game and fish laws of the State against Indians residing on reservations, the Supreme Court of the United States held in Draper v. U.S., 164 U.S. 240, that state courts have jurisdiction to try and punish offenses against state law committed on Indian reservations by non-Indians at least where no offense against an Indian was committed. Accordingly, it is our view as reflected from your file, which is returned herewith, that non-Indian employees of the Mescalero Apache Tribe who violate New Mexico game laws are subject to prosecution and punishment in the courts of this State.

If you should desire a formal opinion to this effect, we shall be happy to render one prior, of course, to the institution of any lawsuits concerning this matter.

Yours very truly,

/s/ROBERT F. PYATT

Robert F. Pyatt
Assistant Attorney General

TRANSCRIPT OF PROCEEDINGS

August 19, 1977

On motion for preliminary injunction)

THE)URT: The next matter is 77-395, the Mescalero Apache Tı e versus the State of New Mexico. Is the Plaintiff ready?

MR. .OOM: The Plaintiff is ready, Your Honor.

THE)URT: Is the Defendant ready?

MR.] JNIGAN: The Defendants are ready, Your Honor.

THE)URT: We will go ahead, Mr. Bloom?

MR. .OOM: Your Honor, we would call Mr. Wendell Chino, the resident of the Mescalero Tribe, as our first witness.

MR. .OOM: May it please the Court?

THE)URT: Yes, sir.

WENDELL CHINO

was callec ; a witness herein by the Plaintiff, and after having been duly 'orn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR.] OOM:

Q. V ıld you state your name for the record, please?

A. M name is Wendell Chino.

Q. M Chino, where do you reside?

A. I ide on the Mescalero Apache Reservation.

Q. A you an officer with the Mescalero Apache Tribe?

A. Y . sir.

Q. What is your capacity with the Mescalero Apache Tribe?

A. I'm the President of the Mescalero Apache Tribe.

MR. BLOOM: Your Honor, we have agreed with the State to stipulate as to the existence of the Reservation and the boundaries as they exist today.

THE COURT: All right, sir.

MR. BLOOM: In South Central New Mexico.

Q. (By Mr. Bloom) Mr. Chino, does the Tribe live in a separate area apart from the normal and general people of the United States?

A. Yes, sir.

Q. How did this come about?

A. This comes about by the treaty that the Mescalero Apache Tribe has with the United States. And also the Reservation that was established by executive order for the Mescalero Apache Tribe and its members.

Q. I will hand you what is marked as Plaintiff's Exhibit 1 and ask if you can identify this for me, please.

A. This is the treaty between the Tribe and the United States.

Q. This is a printed copy of that treaty?

A. Yes, sir.

Q. Does this spell out the terms between the Mescalero Apache Tribe and the United States Government?

A. Yes.

Q. What was the purpose of that treaty?

A. The treaty is a Peace Treaty between the Mescalero Apache Tribe and the United States, and with certain various stipulations regarding the obligations of the Tribe under the treaty and certain obligations that the United States assumes.

Q. What obligations did the Mescalero Apache Tribe assume?

A. The Mescalero Apache people agreed to be under the exclusive jurisdiction of the United States and its laws.

Q. Now, when was this treaty entered into?

A. In July, 1852, I believe.

MR. BLOOM: Your Honor, I have provided copies of all exhibits to Counsel.

THE COURT: All right, sir.

MR. BLOOM: I move for the admission of Plaintiff's Exhibit 1.

MR. DUNIGAN: May it please the Court, we would object to the admission of the exhibit on the grounds that it is not relevant to this case, certainly not before the Defendants have had an opportunity to answer the Complaint, which is the foundation of this lawsuit, at which time we may very well raise objections to the continuing validity of the treaty and we certainly have disputes with reference to its legal significance in any event.

THE COURT: Fine, it will be admitted.

MR. BLOOM: Plaintiff's Exhibit 2 has been stipulated to as being a map showing the boundaries of the Mescalero Reservation as they exist today.

(Plaintiff's Exhibit 1 was admitted into evidence.)

Q. (By Mr. Bloom) Mr. Chino, does the Mescalero Tribe have its own government?

A. Yes, sir.

Q. Can you tell us how that government was formed?

A. The government of the Mescalero Apache Tribe is separated into three branches; the legislative branch, which is composed of the Mescalero Apache Tribal Council, the executive branch, which consists of my office, the vice-president of

the Tribe, and the secretary and treasurer, who are appointed officers by the Tribal Council, and the Tribal judicial branch.

Q. I will hand you what has been marked as Plaintiff's Exhibit 3 and ask if you will identify this for me, please, sir?

A. This is a copy of the Constitution of the Mescalero Apache Tribe.

Q. Is this the constitution under which the Tribal government is formed and operates today?

A. Yes, sir.

MR. BLOOM: I move for the admission of Plaintiff's Exhibit 3.

MR. DUNIGAN: No objection.

THE COURT: It will be admitted.

(Plaintiff's Exhibit 3 was admitted into evidence.)

Q. (By Mr. Bloom) Mr. Chino, what part does the council and executive branch or the legislative and executive branch of the Tribal government play in hunting and fishing that takes place on the Mescalero Reservation?

A. The legislative branch and the executive branch of the Tribe are responsible to declare hunting season, fishing season, on the Reservation as well as to make surveys and game studies in connection with fishing and hunting.

Q. How long has the Mescalero Tribe been concerned in regard to hunting and fishing on its Reservation?

A. Well, I would say from time in memorial the Tribe has been concerned about the wild game on the Reservation.

Q. And the Tribe, through its government, regulate and control hunting and fishing?

A. Yes, sir.

Q. And how do they do this?

A. By the adoption of various ordinances, which promulgate the date and the bag limits and the areas in which the hunt on the Reservation can take place.

Q. Was such done for the year 1977?

A. Yes, sir.

Q. I would hand you what has been marked as Plaintiff's Exhibit 4, 5, and 6, and ask if you will identify these for us, one at a time?

A. First document is Ordinance Number 77-1.

Q. What is the purpose of this ordinance?

A. It's an ordinance that pertains to the hunting and fishing within the exterior boundaries of the Mescalero Apache Reservation.

Q. And this ordinance establishes season and bag limits that you earlier described?

A. It states specifically that no State license of any kind shall be necessary for any person who has a Tribal Hunting License to hunt on the Reservation.

Q. Does it provide for season dates or bag limits in this ordinance?

A. General ordinance with reference to the regulations and can be established by the council.

Q. All right, what is Plaintiff's Exhibit 5?

A. I beg your pardon?

Q. What is the next exhibit, Plaintiff's Exhibit 5?

A. This is an ordinance, Number 77-2.

Q. What does this ordinance provide for?

A. This ordinance provides the hunting regulations with reference to season, bag limits, and license fees.

Q. On the Reservation?

A. On the Mescalero Apache Reservation.

Q. All right, both of these ordinances, Plaintiff's Exhibit 4 and 5, were they adopted by the Mescalero Tribal Council?

A. Yes.

Q. Were they properly approved by the executive department?

A. Yes, sir.

MR. BLOOM: I move for the admission of Plaintiff's Exhibit 4 and 5.

THE COURT: Any objection?

MR. DUNIGAN: No objection, Your Honor.

THE COURT: They will be admitted.

(Plaintiff's Exhibits 4 and 5 were admitted into evidence.)

Q. (By Mr. Bloom) Would you identify for us Plaintiff's Exhibit 6?

A. This exhibit provides for a package hunt, and it establishes the bag limit for various game animals on the Mescalero Apache Reservation.

Q. This is a two-page exhibit. Would you examine the second page, please, sir?

A. Yes. The second page concerns the hunting permit.

Q. This is the application for a permit, is it not?

A. Right.

Q. One who hunts on the Reservation, they have to make one of these out?

A. Yes, sir.

Q. Anyone who obtains a license or wishes to is given this exhibit?

A. Yes, sir.

MR. BLOOM: I will move for admission of Plaintiff's Exhibit 6 at this time.

THE COURT: Any objection?

MR. DUNIGAN: No objection.

THE COURT: It will be admitted.

(Plaintiff's Exhibit 3 was admitted into evidence.)

Q. (By Mr. Bloom) Why have the Mescalero Apaches been so concerned in terms of regulating hunting and fishing within the confines or within the exterior boundaries of this Reservation?

A. First of all, the Tribal Council is interested in the protection and the preservation of wild game on the Mescalero Apache Reservation.

Q. Just for the purposes of preserving it?

A. No. Because the Mescalero Apache Tribe has come to realize that the preservation of wild game on the Reservation would contribute economically to the well being of the Tribe.

Q. How does this contribution take part? Is it part of an overall program of some sort?

A. The Mescalero Apache Tribe is deeply involved in the promotion and development of tourism on the Reservation, and hunting and fishing is a part of the overall tourism development.

Q. So you have chosen to go into tourism and development?

A. Several times it has come to the attention of the Mescalero Apache Tribal Council and the members of the Tribe that in a matter of a few more years the timber income which was the bulk of the Tribal income would diminish very greatly. And because of this fact, the Tribal Council studied other possible avenues to replace and generate that timber income. And we have decided that we don't have any natural resources, but we do have wild game, and we do have outdoor tourism potential. For this reason, we have gone into hunting and fishing.

Q. All right, sir, do you have any other enterprises involved on the Reservation besides tourism and timber?

A. We have our cattle operation, we have our campgrounds, we have the Inn of the Mountain Gods operation which is a tourist complex.

Q. The Inn and campgrounds are part of the tourism development, are they not?

A. Yes, sir.

Q. Have you done anything else besides construct the campgrounds and the Inn of the Mountain Gods?

A. The Mescalero Apache Tribe also owns and operates the Sierra Blanca ski area.

Q. Are there any natural lakes on the Reservation?

A. The lakes that do exist on the Reservation have been created by the Tribe in cooperation with the Bureau of Indian Affairs.

Q. How many of these lakes have been constructed?

A. I beg your pardon?

Q. How many of these lakes have been constructed?

THE COURT: Been built?

THE WITNESS: Approximately eight.

Q. (By Mr. Bloom) What was the purpose of building these lakes?

A. The purpose of building these lakes is to create the bodies of water so that the bodies of water could be planted with fish on the Reservation.

Q. Do you have many natural streams on the Reservation?

A. No, not too many streams on the Reservation.

Q. You had to create a place for fishing, then?

A. We had to create these lakes where there were springs; so basically, these lakes are fed by springs on the various locations.

Q. How are these aspects now of the tourism project? How do these correlate, or how does hunting and fishing correlate to this overall program of these other items?

A. We believe that hunting and fishing correlates very well with the end of the summer tourist season and before the ski season begins. We fill in the months with hunting and fishing programs.

Q. How about the use of campgrounds, how does that fit in with hunting and fishing?

A. We do provide camping facilities at some of the locations where we have created these lakes to provide not only camping facilities but opportunities for fishing.

Q. How do these things, with the use of the hunting and fishing, how do they benefit the Mescalero Tribe?

A. The Mescalero Apache Tribe in its efforts to develop economically, of course, has two major goals: Number one is to provide employment opportunities for members of the Tribe, and the other is to generate income, income to the Tribe so that we could maintain our Tribal government and in turn provide services to the members of the Tribe.

Q. Now, Mr. Chino, how does the hunting and fishing specifically then provide such assistance to the members of the Tribe and to the Tribal government?

A. Oh, hunting and fishing gives individual members of the Tribe an opportunity to serve as guides, so that our own people could take the hunters out into the various hunting areas.

Q. Who pays these guides?

A. The Tribe. And we are responsible to make arrangements for our people to serve in this capacity.

Q. Do you charge for anyone who wishes to hunt or fish on the Reservation?

A. Yes.

Q. What is done with the money that is generated through charging for such hunting and fishing?

A. It goes into the treasury of the Tribe.

Q. This is after the costs and expenses have been taken from it?

A. Yes, sir.

Q. And how do you obtain the fish that are used in these eight lakes that you have described?

A. The fish?

Q. Where do you get them?

A. We get the fish from the Mescalero National Fish Hatchery that is located on the Reservation.

Q. Is this owned or operated by the Mescalero Tribe?

A. The hatchery is owned by the United States Government.

Q. Who runs the hatchery?

A. The Bureau of Fisheries.

Q. Now, to whom will this fish hatchery, to whom do they provide fish?

A. The Mescalero Apache Tribe has priority on the fish. They are produced at the Mescalero National Fish Hatchery. If there are any surplus fish, then these are distributed to other Indian tribes in the State, and in other states.

Q. This hatchery, then, is for producing and provision of fish only to Indian tribes, is that correct?

A. Yes, sir.

Q. When was this fish hatchery put into operation?

A. About 1965.

Q. Why was the fish hatchery placed on the Mescalero Reservation?

A. After the lakes were created on the Reservation, we found that it was necessary to have fish for these lakes, and we went to work and saw to it that the hatchery was located on our Reservation.

Q. The State of New Mexico, did it employ any assistance in the operation of the fish hatchery?

A. The State of New Mexico does not contribute anything into the production, nor to the operation of the hatchery.

Q. Do they provide any assistance in terms of maintaining the lakes?

A. No, sir.

Q. Mr. Chino, have you had any problems brought about by reason of State enforcement of New Mexico Hunting and Fishing Regulations?

A. Yes, sir.

MR. BLOOM: It's been stipulated we could put into evidence Plaintiff's Exhibit 7 and 8, which are—Exhibit 7 is a regulation, 582 of the New Mexico State Game Commission describing hunting and fishing units. And New Mexico State Game Commission Regulation Number 583, which is the official proclamation of bag limits, seasons for hunting and fishing in 1977 in New Mexico, and 582, also, by the way, is for 1977 only. Additionally, Plaintiff's Exhibit 9, which is a fishing proclamation that was distributed to the public by the State of New Mexico, and Plaintiff's Exhibit 10, which is a big game and hunting proclamation distributed by the State of New Mexico to the general public.

Q. (By Mr. Bloom) Have you had any problems in regard to bag limits and seasons as to State regulation or application of State regulations and laws?

A. Very definitely.

Q. What, for example?

A. Well, first of all, I think that we have a conflict of dates with seasons, and we also have a conflict with bag limits.

Q. Can you tell us of any specific conflict with season dates on the 1977 big game season?

A. I think for the hunt, this fall our hunting dates are several days in advance of the State season. This immediately creates a conflict for someone who may have a desire to hunt on the Mescalero Reservation, and in the event that he does take game on the Reservation and transport it beyond the exterior boundaries of the Reservation; and because of this conflict, I think that while he innocently hunts on the Reservation, he jeopardizes himself by transporting the game beyond the exterior boundaries of the Reservation.

Q. Who makes the decision as to the bag limits and seasons within the Mescalero Reservation?

A. These are determined by the Mescalero Apache Tribal Council.

Q. Do they just arbitrarily do this?

A. No. I think our season and the bag limits are supported by studies carried out by our own Tribal conservation officer, as well as the assistance by the Bureau of Indian Affairs, the various studies that are carried out in connection with wildlife on the Reservation.

Q. Do you employ your own officers to do this?

A. Yes, sir.

Q. Are they in fact employees of the Tribe, then?

A. They are employees of the Mescalero Apache Tribe.

Q. All right, sir, do they render any reports to the council? How does the council select what dates to have and how many or how much bag limit to have?

A. Well, I think that the Tribal Council is interested in the number of head of antelope, the number of head of elk, the number of head of deer, that we have on the Reservation, and their approximate movements on the Reservation, and the increases in these various species of wild game. These are all important to the council before they determine the season and the bag limits.

Q. Where do you believe that there is any interference by the Tribe of the State of New Mexico when it enforces the New Mexico Game and Fish Regulations within the Mescalero Reservation?

A. I think that in addition to the conflict of seasons and the conflict of bag limits, we run into what we consider an interference by the State of New Mexico in the exercise of our Tribal government.

Q. Can you be more specific in how that interference takes place?

A. Well, first of all, I think that we could sell a hunter a permit which in our judgment and in our jurisdiction we consider that to be valid. And say that within this conflict of dates he takes his bag limit, and he wants to remove his game from the Reservation.

Q. How does that interfere with the Tribe's right to govern itself, though, within the Reservation?

A. This would prevent many, many hunters from wanting to hunt on the Mescalero Reservation, which would then result in the loss of revenue to the Mescalero Apache Tribe.

Q. Do you feel that this would affect your operation and management of the tourism program?

A. Yes, sir.

Q. Would this in any manner or way affect your cattle raising, the cattle program, or industry?

A. Yes, sir.

Q. How?

A. Because then we would not be able to balance out Tribal income with the cattle income to maintain a sufficient revenue to maintain our government.

Q. Is there a relationship between raising cattle and maintaining a game management program?

A. Yes, sir.

Q. What is that relationship?

A. The usual utilization of the range.

Q. Utilization of the range, you mean if you are going to use one, you can't use the other?

A. Well, I think that we have to assume and provide management for the cattle operation. And by the same token, we have to provide the same type of a management for the operation of wild game.

Q. How does the State regulations interfere with that?

A. Well, like I say, it would result in severe loss of income.

Q. Now, Mr. Chino, does the Tribe maintain any sort of advertising program or dissemination of information about these hunting and fishing programs?

A. Yes, we do issue public information. A form of brochures, proclamations.

Q. Do you do this every year?

A. Yes, sir.

Q. How many years have you been doing this, if you recall?

A. Several years.

Q. Several years. All right, I will hand you what is marked as Plaintiff's Exhibits 11, 12, 13, 14, and 15, and ask if you can identify those for me, please?

A. One exhibit has to do with the 1972 season. The next one has to do with the season for 1973. The next one has to do with the season for 1974. The next one includes the season for 1975. And the last one here includes the season for 1976.

Q. Now, these brochures, generally, what do these brochures tell people who get them?

A. It tells them that hunting is available on the Reservation and spells out the seasons and the fees, and the areas where hunting can take place.

Q. All right, sir. Did you print one of these for the year 1977?

A. Yes.

Q. You did? All right. And is Plaintiff's Exhibit 6 what you printed for 1977?

A. Yes, sir. The application.

MR. BLOOM: I will move for the admission of Plaintiff's Exhibits 11 through 15.

THE COURT: Any objection?

MR. DUNIGAN: No objection.

THE COURT: They will be admitted.

(Plaintiff's Exhibits 11 through 15, inclusive, were admitted into evidence.)

Q. (By Mr. Bloom) Mr. Chino, if the State of New Mexico is permitted to continue enforcement of its game regulations within the Reservation, how will this harm the Mescalero Tribe?

A. I think that it will injure the reputation of the Mescalero Apache Tribe. I think it would result in loss of income to certain individual members of the Tribe, and would also result in the loss of general income to the Tribe.

Q. Would this affect your tourism program?

A. I am certain that it will.

Q. Can you give us an idea in your opinion as to how this might affect the tourism program?

A. Well, let's take for example the package that we have for hunting. We use the Inn of the Mountain Gods as the center for the operation of the package hunting program. If we continue to experience interference by the State of New Mexico, that alone would result in the decrease of guests at the Inn of the Mountain Gods.

Q. Have you had any problems in the past by reason of State enforcement of hunting and fishing regulations against persons who have hunted on the Reservation or fished on the Reservation?

A. I believe it was last year when two individuals who were given hunting permits by the Tribe took game, and after they left the Reservation with this game finally, finally resulted in some action taken against them by the State of New Mexico.

Q. Did they conform to the Mescalero regulations?

A. Yes, sir. Animals were tagged by the tags provided by the Tribe.

Q. Has this affected the Tribe's operations in any manner or way in terms of harm to your knowledge?

A. I am pretty sure that these two hunters had this one unfortunate experience, have already to some degree warned other hunters and their friends.

MR. DUNIGAN: Objection, Your Honor. I think this is just speculation.

THE COURT: Sustain the objection.

Q. (By Mr. Bloom) Was there any publicity in the news media as to what happened in regard to these two hunters?

A. I think that the action taken against these hunters appeared I believe in one of our county papers.

Q. Mr. Chino, who, specifically, handles the enforcement on the Reservation of the Mescalero Hunting and Fishing Regulations?

A. The Mescalero Apache Tribe and the Bureau of Indian Affairs.

Q. Who specifically from the Tribe does this job of enforcement?

A. The Tribal conservation officer.

Q. Are they employed by the Tribe?

A. They are employed by the Mescalero Apache Tribe.

Q. Have they been trained in this capacity?

A. Yes, sir.

Q. Have they been given any special training in this capacity?

A. Yes. In fact, they are too technical for me.

Q. Now, you stated by the BIA, Bureau of Indian Affairs, are these conservation officers, by whom are they actually employed? Who pays their salaries?

A. When it comes to the officers of the Bureau of Indian Affairs, then the United States Government pays their salary.

Q. How about the Mescalero conservation officers?

A. The Mescalero conservation officers are paid by the Mescalero Apache Tribe.

Q. Do you know of your own knowledge how these officers carry out their duties on the Reservation as Reservation officers?

A. Would you repeat your question?

Q. Do you have knowledge, your own knowledge, of how the Mescalero conservation officers carry out their duties?

A. They carry out their duties, in addition to what I have already mentioned, and that is surveys and studies that they must make with regard to wildlife. But they are also on constant patrol to enforce the hunting and fishing laws of the Tribe.

Q. Do they attempt at any time to enforce the regulations of the State of New Mexico on the Reservation?

A. Would you repeat your question?

Q. Do these officers also enforce the hunting and fishing regulations of the State of New Mexico on the Reservation?

A. No, sir.

Q. Are these part-time employees?

A. No, they are all full-time employees.

Q. The year round?

A. Year round.

MR. BLOOM: Thank you. I will pass the witness.

THE COURT: Mr. Dunigan?

MR. DUNIGAN: May it please the Court?

THE COURT: Go ahead, sir.

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Chino, in the various Tribal publications which you have identified as Plaintiff's Exhibits 11 through 15, I believe you said that this is the information published by the Tribe pertaining to big game hunting for the seasons '72 through '76, is that correct, sir?

A. That is correct.

Q. Isn't it true that in those publications, Mr. Chino, that the Tribe made, gave express notice to the prospective hunter that New Mexico State law or regulations of the State of New Mexico pertained to the hunting and fishing, or at least hunting on those Reservations?

A. I am sorry, I did not catch your first words there?

Q. My question is whether or not the publications to which we have reference contained the recognition and explained to the hunter, give the hunter notice, the prospective hunter notice that the New Mexico State law and regulations of the department pertain to hunting on the Reservation?

A. No.

Q. Well, as an example, Mr. Chino, let me refer you to Plaintiff's Exhibit No. 15, which is the big game hunting information pertaining to the year 1976. And if you will read the paragraph at the bottom of the second page?

A. The entire paragraph?

Q. Yes.

A. "Under a New Mexico State law, the total number of deer which may be taken by any one hunter in one year is two. Therefore, a hunter purchasing both a whitetail permit and mule deer permit could take one whitetail buck and one mule deer of either sex or one mule deer buck and one mule deer doe. He could not legally take a total of three deer."

Q. Isn't that statement a recognition on the part of the Mescalero Apache Tribe that State law is applicable on the Reservation, at least as it pertains to big game hunting?

A. No.

Q. Why was the statement in the exhibit?

MR. BLOOM: Your Honor, I have to object. I think this is a legal conclusion. It's going to have to be drawn by the Court, based upon the fact that whatever language is there speaks for itself. And as to why it was put in, I think he can go into that, but for asking about conclusions about whether it conforms or not is something else.

THE COURT: He can inquire as to the witness's knowledge.

Q. (By Mr. Dunigan) Why was this statement in the exhibit?

A. I think the controlling factor there is the preservation.

Q. Pardon?

A. Preservation of game.

Q. But it does give notice, does it not, to the reader that he will be expected to comply with the laws of the State of New Mexico?

MR. BLOOM: I am going to object, Your Honor. The language speaks for itself.

THE COURT: Right.

Q. (By Mr. Bloom) With reference to the same exhibit, Mr. Chino, I ask you to read from that exhibit a sentence located within the exhibit, which would be the next to the last page. Could you please read that paragraph?

A. "A staff of well-trained Tribal conservation officers will assist hunters. All New Mexico hunting regulations apply. There will be additional restrictions on calibers and bullet weights for elk hunting. Additional information may be obtained by contacting the Hunt Manager, Mescalero Tribe, Mescalero, New Mexico, 88340. Phone 505 671-4495."

Q. To your knowledge, Mr. Chino, do the other exhibits which you have identified pertaining to hunting on the Mescalero Reservation from 1970 to 1972 through 1975 also contain the statement that all New Mexico hunting regulations apply?

A. I believe so. But I would like to state that any references made to the State of New Mexico are done as a matter of accommodating in our efforts to cooperate with the State.

Q. Fine, for whatever reason that the Tribe may have in giving that information out, the prospective hunter coming to the Reservation to hunt is advised that the regulations of New Mexico pertaining to hunting apply?

A. It applies to the extent of good hunting principles, that is the purpose of these references.

Q. The references are however—

A. Not as to the application, the enforcement of New Mexico law.

Q. The statement itself, as you have read it, is all New Mexico regulations apply, is that correct?

A. That's the way it reads.

Q. Mr. Chino, you mentioned in your testimony that one of the reasons regulation of hunting and fishing on the Reservation by the State of New Mexico creates problems for the Tribe, was that in 1977, for example, there was a conflict in the season date? Is that correct?

A. Yes, sir.

Q. For what hunting season is there a conflict?

A. I think in the antelope season, our season opens earlier than that of the State.

Q. Your season opens on what date?

A. Pardon?

Q. On what date does your season open?

A. I think the latter part of August. And the State season opens in September.

Q. The difference is a matter of days?

A. Yes. But that's crucial to—

Q. Why is it crucial? What is the significance of that? Or is it significant?

A. That from a standpoint of enforcement, I think that we, as a Mescalero Apache Tribe, believe that we are issuing, a hunter who comes on our Reservation purchases a license to hunt, is hunting in good faith.

Q. But what significance does it have with respect to—

A. And by reason of the conflicts he may very well be picked up by the State, a State game enforcement officer.

Q. That is an after-the-fact situation, Mr. Chino. I'm asking why the Tribal Council chose August 29th as the date for the season to begin as opposed to the September date that the State Game Department had chosen?

A. Well, I think that the establishment of the hunting dates on the Reservation comes in the purview of the Mescalero Apache Tribe. Therefore, it has a responsibility to establish the season.

Q. Whether or not that is the case, why was the particular date chosen? Does it have some significance?

A. I am pretty sure that these dates could very well be supported by studies that are carried out by our conversation

Q. Q. On what date was the hunting season for antelope established on the Reservation by the council?

A. I don't recall.

MR. BLOOM: May it please the Court, the regulations setting the date and what have you are in evidence at this time.

Q. (By Mr. Dunigan) Mr. Chino, I refer you to Plaintiff's Exhibit No. 5, which is the Mescalero Apache Ordinance, which I believe you testified established the hunting seasons on the Reservation, and embodies the Mescalero Apache hunting and fishing proclamation? I would like to ask if you from that document can discern on what date it was adopted by the Tribal Council?

A. Adopted on June 17th, 1977.

Q. Thank you. At that time, Mr. Chino, to your knowledge, did the Tribal Council know or was the Tribal Council aware of the antelope season that had been established by the Department of Game and Fish to the State of New Mexico for areas within the State?

A. I believe not.

Q. Was the difference of a matter of a few days in those dates established merely for the purpose of establishing a foundation for this lawsuit?

A. No, sir.

Q. If there is a significance between the date in which the antelope season begins on the Mescalero Apache Reservation, and the date established by the Department of Game and Fish, you are not able to testify as to what it is, is that correct?

A. Could you repeat your question?

Q. If there is a significance between the difference in dates on which the antelope season begins on the Reservation and in the rest of New Mexico, you are not able to explain to the Court what the significance of the difference is, is that right?

A. Well, the difference, the significance that I can think of is that it could do a great harm on the Mescalero Apache Tribe.

Q. Okay.

A. By the difference in dates.

Q. How will that cause harm to the Tribe?

A. Because the dates do conflict, as I've already testified. And there would be hunters who would hesitate, that they would be hesitant to hunt on the Mescalero Apache Reservation knowing that they could be subject to prosecution by the State of New Mexico.

Q. To your knowledge, have there to your knowledge been any hunters who have expressed an interest in hunting between August 29th and September 3rd and have been deterred on the Reservation and have been deterred from doing so because of the conflict?

A. Not to my personal knowledge.

Q. You are just assuming that that might be the case?

A. Yes, sir. But it's not only an assumption but, like I said, this hunting incident last year, I think validates my assumption.

Q. Well, you know of no instance at least with reference to this year in which a hunter has been deterred from hunting on the Reservation?

MR. BLOOM: I am going to object. There aren't any hunting seasons open and won't be; the State's, by proclamation, is September 1st; the Tribe, August 29.

THE COURT: Fine, he may answer.

Q. (By Mr. Dunigan) To your knowledge, has there been any occasion in which a prospective hunter has been deterred in his interest in hunting on the Mescalero Apache Reservation by the fact that he might be thereafter arrested and prosecuted by the State of New Mexico for hunting out of season?

A. Not to my personal understanding. Not to my personal knowledge.

Q. Now, Mr. Chino, do you know the number of licenses that have been authorized by the Mescalero Apache Tribe for hunting for the 1977 season of elk?

A. I don't recall specifically.

Q. Do you know how many have been authorized for deer?

A. I don't recall.

Q. How about antelope?

A. I don't recall either.

Q. Isn't it a fact, Mr. Chino, that for the 1977 season all of the licenses that have been authorized by the Tribe for elk have been sold?

A. That is my understanding.

Q. Isn't the same true for deer?

A. I cannot—not to my knowledge.

Q. How about antelope?

A. I do not know.

Q. Do you know whether there is a waiting list for any of these hunts?

A. Well, I know in previous package hunts and other hunts, we have more demands than we can meet. Perhaps I should amplify on that statement by reason of our proclamation.

Q. Well, let me ask you, Mr. Chino, do you know of any instance in which any hunter who has expressed an interest to hunt on the Mescalero Reservation has been dissuaded or deterred from doing so because of fear that he will be prosecuted by the State of New Mexico if he violates any of the laws or regulations of the State pertaining to hunting or fishing?

A. Not to my personal knowledge.

Q. And as a matter of fact, the Tribe has no objection if a hunter purchases a State license so long as he meets your requirements as well, is that right?

A. That's a matter for the hunter to determine.

Q. The Tribe will not deny him access to the Reservation if he has a State license so long as he meets your requirements?

A. As long as he complies with and he meets the hunting regulations of the Tribe.

Q. So whether he buys a license or not from the State is up to him, the individual hunter?

A. That is correct. But that does not give him an entry to hunt on our Reservation.

Q. With reference, again, Mr. Chino, to Plaintiff's Exhibit No. 5, which is the ordinance of the Tribe establishing the or embodying the hunting and fishing proclamation for 1977, doesn't, in the proclamation, it alert the prospective hunters to a controversy existing between the Tribe and the State with reference to whether or not State laws apply and whether a State license is required for hunting on the Reservation?

A. I don't recall.

Q. Well, let me refer you, then, to the exhibit, Exhibit 5, and ask you if you will read the last paragraph on Page 6, which is highlighted by the phrase, "Note" and then a colon, and the rest of the language is in all capital letters. Would you read that, please?

A. "The State of New Mexico and the Mescalero Apache Tribe are presently involved in a controversy regarding the issue of whether or not a New Mexico hunting or fishing license is required of a non-Indian in order to hunt or fish on the Mescalero Reservation. The Tribe maintains that no State license is necessary, but accept no responsibilty for any consequences which may be suffered by reason of failure to obtain a State license. Current information regarding this controversy is available in Tribal Offices, Mescalero, New Mexico, 88340.

Q. Fine. Thank you. Now, Mr. Chino, you testified that in your judgment that unless the State is enjoined as requested in the Complaint, that the Tribe will suffer a loss of reputation. What do you mean by that? Could you be more specific about how it would suffer in that regard?

A. I think that the Tribal Council acts in good faith when it promotes and approves hunting on the Mescalero Apache Reservation. And this information then becomes available to the public. And once this information becomes public, then the integrity of the Tribe is then placed on the line. And we do intend to conduct and to allow hunting on the Reservation. And if in the event that we could not do so, then we have created some questions regarding the integrity of the Tribe.

Q. You mean the public could not place reliance on the statements made by the Tribe in that case?

A. Yes, sir.

Q. Well, Mr. Chino, all of the information that is published by the Tribe with reference to this, and you have identified many examples of it, including the 1977 proclamation, gives notice to any prospective hunter, does it not?

MR. BLOOM: Objection. It's totally misleading, what was discussed was only the 1976 or '75 and prior brochures. He has not gone into the 1977 brochure.

MR. DUNIGAN: May it please the Court, the statement recently read by the witness was from the 1977 proclamation concerning the controversy existing between the State and the Tribe alerting any prospective hunter to the fact of the controversy, indicating the Tribe would not take responsibility if the hunter got in trouble with the State.

MR. BLOOM: Having a State license is not the controversy. It isn't going to create or cure the controversy. The controversy here is enforcement here of the State of New Mexico with who hunt on the Reservation.

THE COURT: Go ahead, Mr. Dunigan.

Q. (By Mr. Dunigan) Mr. Chino, how will the reputation of the Tribe be hurt in the regard in which you have stated, when in fact the information sent out to hunters gives notice of the possibility that the hunter will get in trouble with the State if he doesn't have a State license?

MR. BLOOM: I object, Your Honor. It doesn't say that. It says that there is a controversy.

THE COURT: Fine. He may answer the question.

A. How will it?

Q. Yes, how will the reputation of the Tribe suffer when it's warned the people with which it does business that there is a possibility of difficulty?

A. We are relying only to the extent that we are to issue our license or permit if he wishes to hunt on our Reservation.

Q. Right, but if he wants to do that, the information that you have supplied warns him that there could be trouble and puts any risk of difficulty on the hunter, doesn't it?

A. That is true.

Q. Didn't you say earlier in your testimony that as far as the Tribe is concerned it's entirely up to the prospective hunter with respect to whether or not he gets a State license? As long as he meets your requirements as well?

A. Yes.

Q. So then you really can't explain how the reputation of the Tribe would be injured then if the injunction is not entered prior to the litigation of this suit on the merits?

A. I think that one may take the position that the Tribe on one hand issues him the license, and supposing that he is prosecuted by the State, then having already secured it in good faith, he relies on the Tribe, then he finds himself in jeopardy. Then he can no longer have that complete confidence in the Tribe, in the validity of a Tribal hunting license.

Q. How can he blame you for that when you have given him notice of the very fact he may get in trouble with the State? He got himself in that hot water, didn't he? How can he blame you? Why would it hurt your reputation?

A. By offering him, offering him a license which we believe to be within the proper exercise of the Tribe to do so.

Q. Between now and the time this case may be finally litigated on the merits, how much income will be lost to individual members of the Tribe? You stated that it was your judgment—

A. I would say a sizable amount.

Q. How much?

A. 10,000, 20,000.

Q. What do you base that on?

A. That's on the individual members of the Tribe.

Q. Each?

A. No, I am not speaking collectively of all the members of the Tribe, but to those members who serve as guides.

Q. You are not suggesting that each Tribal member who serves as a guide would be out ten to twenty thousand dollars a piece, or are you?

A. Whatever number of Tribal guides would require to take care of the hunters from outside of the Reservation.

Q. What do you base the figure 10,000 or 20,000 on?

A. On the prospective number of licenses that could be issued.

Q. But you said you didn't know how many licenses have been authorized?

A. Well, I think that I reserved some judgment to estimate the possible number that could be issued.

Q. Well, do you know how many have been authorized for '77?

A. No, I don't recall exactly.

Q. So you really don't have any basis in your testimony now that the loss to Tribal members individually would be ten to twenty thousand?

A. Well, to individual members and it could run as high as a hundred thousand to members of the Tribe to support and maintain their Tribal government. Then it begins to affect each individual member.

Q. On what do you base the figure, a hundred thousand dollars?

A. I am just speaking of the anticipated revenue from whatever number of licenses that the Tribal Council has approved.

Q. You're estimating, did you say?

A. Yes.

Q. Well, on what basis do you make that statement, if you don't know the number of licenses you are talking about?

A. Well, I am speaking of an approximation, like I said, I think I reserved some judgment on it.

Q. Aren't you approximating out of the air?

A. Pardon?

Q. Aren't you approximating out of the air, if you have no foundation for the statements?

A. Well, perhaps I am somewhat guided by some previous years' experience.

Q. Now, that figure, assuming it's reliable, of a hundred thousand dollars, that's for the entire hunting and fishing program for the year, isn't it?

A. This is for the hunting alone, I believe, that I am speaking of.

Q. Well, the Complaint which was filed in this cause, Mr. Chino, indicated that the Apache Tribe and its members derive substantial economic benefit from persons hunting and fishing on the Reservation. In 1976 such benefits were in excess of a

hundred thousand dollars. So that would seem to suggest, and it was pled in this case, it was alleged that a hundred thousand dollars was the figure, the economic figure for the entire '76 season for hunting and fishing and both for Tribal income and income going to individual members of the Tribe, is that correct?

MR. BLOOM: I have to object, Your Honor. The pleadings speak for themselves. We say there was an income in excess of a hundred thousand dollars in 1976, and that was all that was said. No other implications or ramifications other than what was said in the pleadings.

MR. DUNIGAN: Your Honor, Mr. Chino verified this Complaint, and I am simply seeking from him an indication of what it is the Tribe is alleging.

THE COURT: Fine, I think the allegation is there, Mr. Dunigan.

MR. DUNIGAN: Fine, Your Honor.

Q. (By Mr. Dunigan) And is it your testimony now, Mr. Chino, that this hundred thousand dollar figure relates only to income from hunting, and that there will be additional income from fishing?

A. It could vary.

Q. Pardon?

A. It varies.

MR. BLOOM: May it please the Court, we have alleged that it's in excess of, we have not put it down to a specific one hundred thousand dollars for 1976. This thing is getting to be nothing but argumentative over what is alleged in the Complaint.

MR. DUNIGAN: My question had no reference to the Complaint. And it's reference to 1976, Your Honor, I was having reference to prior testimony of this witness who estimated that the Tribe may suffer a loss of income of a hundred thousand dollars if the State is not enjoined.

THE COURT: Fine. That's the allegation.

Q. (By Mr. Dunigan) Now, Mr. Chino, you have indicated in your testimony that all of the licenses that have been authorized for elk have been sold? Is that your impression that all have been sold for deer, and that you didn't know what the situation was with respect to antelope? Now, if those are the facts for that, for the present time, how is the Tribe going to suffer any loss of income at all if this injunction is not entered?

A. I testified to I only understand that the elk permits were sold out, that I do not have personal knowledge and information regarding the other game animals.

Q. Well then, at least with respect to the elk hunt, there can be no loss of income if an injunction is not entered, is that correct?

A. Would you repeat your question?

Q. At least with respect to the elk hunt scheduled for the Reservation in '77, there will be no loss of income if the Court refuses to grant a preliminary injunction?

A. If the Court refuses?

Q. Yes. Because they have already been sold out? Is that right?

A. That would be the case.

Q. What is the cost of a Tribal elk license?

A. I don't recall.

Q. Mr. Chino, I show you what has been marked as Plaintiff's Exhibit No. 6 and ask you if you again would describe what that is.

A. The information concerning a package hunt which includes the application for the hunt as well.

Q. How does a package hunt differ from any other kind of a hunt?

A. Any other hunt?

Q. Yes.

A. I think that this includes the lodging, meals, the person to be available to the hunter.

Q. With reference to the exhibit, Mr. Chino, would you indicate how many permits have been authorized by the Tribe for antelope package hunts for the period of August 29th through September 2nd, '77?

A. You want me to indicate the —

Q. The number of permits that are authorized.

A. Ten.

Q. And the price?

A. 500.

MR. BLOOM: Your Honor, the exhibit will speak for itself.

THE COURT: It does.

MR. DUNIGAN: Well, certainly, the exhibit speaks for itself. I'm simply exhibiting from, or requesting the witness to highlight that information for the Court from the exhibit.

THE COURT: I don't believe there's any need to, Mr. Dunigan, unless you have something that you have a problem of interpreting.

MR. DUNIGAN: Fine, Your Honor.

Q. (By Mr. Dunigan) Mr. Chino, do you know whether or not all of those ten permits have been sold?

A. Not to my knowledge. I would like to state that as the chief executive officer of the Tribe, I have a staff who are concerned with these figures, amounts, detailed information. And in addition to that, of course, I travel a great deal, and I just cannot have all of this detailed information at my fingertips.

MR. BLOOM: Your Honor, we have a witness here who can cover these detailed areas, if that's what Mr. Dunigan is getting to.

THE COURT: All right, sir.

Q. (By Mr. Dunigan) Mr. Chino, let me ask you this. With reference to Exhibit No. 6, does the $500 indicated simply

refer to the license fee or is that the total cost of the entire package hunt?

A. That's the way it is presented.

Q. As what?

A. As a package.

Q. That would be the entire cost of the hunt and the license?

A. As advertised, shown by the exhibit.

MR. DUNIGAN: I have no further questions, Your Honor.

THE COURT: Any rebuttal?

MR. BLOOM: Very short, Your Honor.

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Mr. Chino, when did the Mescalero government decide that the New Mexico Game and Fish Regulations were no longer going to be enforced and applied within the Mescalero Reservation?

A. The Tribal Council believes that hunting and fishing on the Mescalero Reservation is in the purview, the jurisdiction of the Mescalero Apache Tribe, and that no other laws shall govern or pertain to hunting and fishing on the Reservation.

Q. It goes back to the Tribe's view of its own sovereignty and power?

A. Yes, sir.

Q. At the time that the State of New Mexico established its game seasons for antelope, did they contact the Mescalero Tribe about what the Tribe's wishes might be within the Reservation?

A. Not to my knowledge.

Q. What was the purpose, really, of putting this note on the 1977 application for hunters and in the regulation, this note that appears in Plaintiff's Exhibit 5 at the end, what was the reason for putting that into that proclamation and ordinance?

A. To let the hunter know that as far as the Mescalero Apache Tribe is concerned, that—

Q. Basically, you were just trying to be fair with the hunter, were you not?

A. Yes, sir.

Q. Is the injury from any arrest this year going to occur this year or next year or the year after? When are you going to have the damage from such arrests?

A. I think that at the time the arrest occurs.

Q. A hunter arrested this year has already bought his license, will he be back next year?

A. Probably not.

MR. DUNIGAN: Objection.

THE COURT: Sustain the objection.

MR. BLOOM: I will pass the witness, Your Honor.

THE COURT: Let's take a recess until 3:25.

(Recess taken.)

THE COURT: Please be seated.

MR. GOTTSCHALK: Your Honor, I will need to get Mr. Bloom.

THE COURT: Go ahead. Yes, sir.

MR. BLOOM: Your Honor, we will call Mr. Robert H. Bradley. We are calling him out of order, but he has to get on back to Alamogordo.

THE COURT: All right. That is fine.

ROBERT H. BRADLEY

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

MR. DUNIGAN: No further questions.

THE COURT: Rebuttal?

MR. BLOOM: I have nothing further, Your Honor.

THE COURT: You may step down.

MR. BLOOM: May this witness be excused?

THE COURT: If there is no objection, he may be.

MR. DUNIGAN: No objection.

THE COURT: All right.

MR. FETTINGER: We call Mr. Richard Wardlaw, Your Honor.

RICHARD A. WARDLAW

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. FETTINGER:

Q. Mr. Wardlaw, are you employed by the Mescalero Apache Tribe?

A. I am.

Q. Are you the administrative assistant to the president of the Mescalero Apache Tribe?

A. I am.

Q. In that capacity, do you generally have supervisory capacity over the records of the Mescalero Apache Tribe in hunting, fishing, and in generally all other matters?

A. I do.

Q. And how long have you been so employed?

A. Oh, approximately 16 years.

Q. You are generally familiar with the testimony given here this afternoon by Mr. Chino regarding hunting and fishing, and you heard the questions generally asked concerning the income of the Tribe in that area. Do you have with you instruments from which you can tell us what the income of the Mescalero Apache Tribe was from hunting, from fishing, and the sale of licenses, of that nature, and indirectly from hunting and fishing activities on the Reservation?

A. I do.

Q. Would you tell us for the year 1976, which I believe is the last year for which we have records, what the income of the Mescalero Apache Tribe was from this subject area?

A. The income of the Mescalero Apache Tribe from fishing for the year 1976, now this is the, I am going to qualify this, this is the fiscal year, ended June 30th, and our hunting and fishing permit sales lap over that fiscal year.

Q. You say that is true for the prior year as well?

A. That would be true for the prior year. That would be true for all of the figures that I give, they're June 30th totals, so any errors that are existing in the fiscal year ending June 30th, 1977 would be simply the same, compensated for rather by the prior year, compensated for by the following or preceding years.

Q. Fine.

A. 1976 fishing amounted to about $51,000 worth of permits. This is fishing, picnicking, and overnight camping at the recreation areas of the Tribe. The direct license revenue which comes to the Tribe was $92,596, or a total of a hundred and forty-four thousand of direct revenue to the general treasury of the Tribe. Now, that does not include in 1976, for example, that portion of the package hunt or package hunts, which went to the Inn of the Mountain Gods. In 1976 we have, he had 125 package deer hunts which $350 of a $550 fee went

to the Inn for room, for lodging, for food, for guide services, and other auxiliary services provided by the Inn to the hunter. On the elk hunts, we were authorized, the council authorized 50 bulls and 50 cows. These were package hunts only. $1400 for a bull package, $800 for a cow package. Of that, $400 went to the Inn and a thousand dollars went to the Tribe on the bulls. And $400 to the Inn and $400 to the Tribe on the cow package. Now, that, for 1976, if you go through and project, and we were so allowed in 1976 to go through and project the income in the brochure, it amounted to approximately $206,000.

Q. Is that total income from hunting and fishing activities on the Reservation including the income of the Inn of the Mountain Gods?

A. That would be the total direct income. There is ancillary income which would come in the form of wives, children, non-hunters, who also come to the Inn with the hunter. The council, a number of years ago, made the decision that the—well, Mr. Chino has testified to this—that the thing that we have to do is to find some other source, some sort of income other than timber income generating income for the operation of the Tribe, Tribal government, and to employ, employment for the people. At the time that they did this, they made a commitment as far as hunting was concerned, and some of the first public hunts held on the Reservation were held at that time, or were done at that time. It gradually built up, it is not a small source of income now. We expect it to become larger, but even more importantly, it is an attraction to bring, we refer to them as "guests" to the Reservation to enjoy the hunting that we have here. Then to use the other facilities, the Inn, the recreation areas, the fishing areas, that we have there. This generates additional income and additional employment for our people.

Q. Is the hunting and fishing program really an integrated part of the recreation development program?

A. Yes.

Q. Is the Inn operated by the Mescalero Apache Tribe?

A. Entirely.

Q. Are 50 percent or more of the people of the Inn of the Mountain Gods also members of the Tribe?

A. Yes, sir.

Q. Are all the conservation officers members of the Tribe?

A. Yes, they are.

Q. Could you tell me if the Tribal Council in fact makes a conscious decision each year as to the hunting season that will be established on the Reservation?

A. From the time that I have been there, the Tribal Council has prepared a hunting proclamation each year establishing seasons, establishing bag limits, and establishing the fees to be charged.

Q. Does the Tribal Council also decide how money will be spent that is earned from the hunting and fishing activities on the Reservation?

A. As I said, the licensing fees, that portion which would be classed as licensing fees, goes back into the general treasury of the Tribe and is appropriated by the Tribal Council each year.

Q. Is that a governmental decision?

A. Yes.

Q. Is it a governmental decision of the Tribe to establish the bag limits?

A. Yes.

Q. At a council meeting?

A. Yes.

Q. Is the resolution or ordinance form kept as a regular part of the permanent record of the Tribe?

A. It is a part of the permanent records of the Tribe.

Q. If it is an ordinance of the Mescalero Apache Tribe, is it submitted to the Secretary of Interior's duly authorized representative for approval?

A. All are routinely submitted.

Q. The Mescaleros have a conscious program to develop goodwill with its neighbors and customers that patronize the facilities on the Reservation?

A. Yes. Hunting and fishing by itself, we prepare a brochure which advertises hunting and fishing. Hunting and fishing is integrated into the advertising programs of the Inn. It is routinely—I think it is routinely mentioned in the advertisements of Sierra Blanca Ski Enterprise as well.

Q. We have a broad-based program of informing the public of what is available on the Reservation?

A. We do.

Q. Has the Tribe established any policy in regard to making refunds in connection with the package tours or hunting and fishing licenses that have previously been issued on the Reservation?

A. The permits and all the information is that no cancellations, no refunds. However, in several instances a hunter has broken a leg, if we can resell the permit, if there is, in fact, a waiting list, we can resell the permit, we will refund the money to him.

Q. What is the reason for that?

A. We have refunded—

Q. What is the reason for establishing that policy, if you know?

A. To encourage the gentlemen to go back. When we had one that had a broken leg, we had another where there had been a death in the family.

Q. Goodwill?

A. Goodwill.

Q. You have heard the testimony regarding Mr. Shaw and Mr. Oliver. And I believe they are the gentlemen that were cited for game practices, or having in their possession game taken on the Reservation. Did Mr. Shaw or Mr. Oliver, either one of them, apply for a hunting license on the Mescalero Reservation this year?

A. I do not believe so.

Q. Historically, has the employment rate on the Mescalero reservation improved over the last few years?

A. Significantly.

Q. Is that improvement due largely to the increased number of people employed by the Tribe in its own activities?

A. Very definitely.

Q. Prior to 1977, if you know, how many times did Mr. Shaw or Mr. Oliver have hunting licenses on the Reservation? It's my understanding when that was discussed that there have been two, they had a license in 1976 and a license in 1975.

MR. DUNIGAN: Objection, Your Honor. It would appear from the testimony of the witness that he has no first-hand knowledge of the duties of which he has been asked to testify.

THE COURT: You may inquire further, Mr. Fettinger, and see what the source of his information is.

Q. (By Mr. Fettinger) Mr. Wardlaw, upon what information is your prior answer based?

A. Telephone conversations with Mr. Shaw, Mr. Oliver, subsequent investigation to try to determine what happened, why this happened, and see if we could be of assistance in the spirit of goodwill.

Q. In that same spirit of goodwill, have we, to your knowledge, has the Mescalero Apache Tribe attempted to cooperate with the State of New Mexico in prior years in connection with hunting and fishing?

A. We attempted to. We have, as I said, we look at the hunters and the others that use our facilities as guests. We have to keep, we have to keep the, a good image before them. Mr. Chino testified that the integrity of the Tribe is at stake. The integrity translates into goodwill. If we say something, if we promise something, if the Tribal Council issues a proclamation that says we will have hunting on such and such a day, we feel it's up to the Tribe to give those people unimpeded good hunting during that period of time.

Q. To your knowledge, was there any conscious effort on the part of the Mescalero Apache Tribal Council, or did it come to their attention that the State of New Mexico had a conflicting antelope season proposed?

A. I don't think it was even considered.

Q. To your knowledge, how did the, upon what information was the council decision based?

A. The council's decision on seasons, bag limits, or seasons and the bag limits are based on recommendations by the conservation officers prepared following their annual game counts and surveys. And these are, these recommendations are prepared in cooperation with the Bureau of Indian Affairs. And the Range Conservation Department.

Q. They are all conservation officers employed by the Tribe, full-time officers-employees? How many full-time employees do we have working as conservation officers year round?

A. Seven full time.

Q. How many part-time do we have during the hunting season to assist the hunters, hunters coming on to the Reservation?

A. I don't have accurate records on the part-time employees.

Q. Can you give the Court any idea?

A. Ordinarily, 15 or 20.

Q. Additional people, part-time?

A. Yes.

Q. They are used exclusively in connection with the hunting and fishing on the Reservation?

A. Just the hunting. There are additional people, approximately ten or twelve, that are employed during the fishing season, at the various recreation areas where fishing is permitted on the Reservation.

Q. How long has the Inn of the Mountain Gods been open?

A. Oh, two years, more or less.

Q. Has the Inn of the Mountain Gods' business generally increased as it was in business longer?

A. Yes.

Q. Is that consistent with the projections that were made at the time, projections that were made, and the representations made on the various financing agencies at the time that the Inn was first conceived?

A. It is.

MR. FETTINGER: I have no further questions, Your Honor.

THE COURT: Mr. Dunigan?

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Wardlaw, are you a member of the Mescalero Apache Tribe?

A. I am not.

Q. Are you a member of any tribe of Indian?

A. Probably your tribe.

Q. You are a non-Indian?

A. I am a non-Indian.

Q. And you have been an employee of the Mescalero Apache Tribe for the last 16 years?

A. Yes, sir.

Q. Have you ever hunted on the Mescalero Apache Reservation?

A. I have.

Q. On those occasions, did you purchase a license issued by the Mescalero Apache Tribe?

MR. FETTINGER: Objection, Your Honor. The individual purchasing a hunting license has nothing to do with the issues of this case. I think it is totally—

THE COURT: Sustain the objection.

Q. (By Mr. Dunigan) Mr. Wardlaw, the total direct income figure that you cited, and I believe it was $206,000 or thereabouts, to what period does that figure relate?

A. $206,000, if you go through and project from our brochure for 1976, and we have sold out in 1976.

Q. '77 you mean?

A. 1976 were the figures I gave.

Q. Okay, the 206?

A. The 206 relates to 1976 hunting season. If you go through and project the bag limits and fees, this, I believe from my rapid calculations, would amount to $206,000.

Q. For the 1976 season?

A. For the 1976 season.

Q. Now, has the '76 season come to an end?

A. The 1976 season would have begun, would have begun the date stated in the 1976 brochure. We are into the 1977 season now.

Q. Do you have any projections with reference to the 1977 season?

A. All I have on the 1977 season is the income received to date.

Q. What is that?

A. $82,415 for hunting, $49,073 for fishing, and a 131,488 total.

Q. For the 1977 season, how many permits to hunt antelope on the Reservation had been sold?

A. To my knowledge, five. I do not handle that directly. That's hearsay.

Q. Do you have any knowledge of what percentage or what number of permits to hunt deer have been sold?

A. I think the deer are sold out. I think the elk are sold out.

Q. And if your knowledge with reference to the antelope is correct, that would be, constitute one-half of the antelope limits, is that correct?

A. That is correct.

Q. Mr. Wardlaw, you were asked whether the Tribe had attempted in the past to cooperate with the State Department of Game and Fish, and I believe your answer was in the affirmative?

A. It was.

Q. With refererence to those requests, did the department ever on any occasion refuse to be of assistance to the Tribe, to your knowledge?

A. I say we attempted to cooperate, and that, I think, is the reason that the notation was in the brochures, that again in this 1977 proclamation. We don't know what the situation is. If you invite a guest into your home, and you don't know what is in an open bottle, you must warn him that you don't know what the contents might do.

Q. You wanted to put the prospective hunter on notice as to what the circumstances may be?

A. This is right.

Q. Mr. Wardlaw, do you have any knowledge of how conflicts in the past with reference to season dates or bag limits between the Mescalero Tribe and the department may have been resolved?

A. Pardon?

Q. In the past, to your knowledge, have there been any conflicts between the Tribe's hunting and fishing proclamation in terms of bag limits and dates and the Department of Game and Fish of the State of New Mexico?

A. The Tribal Council will ordinarily or does in fact prepare their hunting proclamation. This does not necessarily coincide with the proclamations of the State of New Mexico and on several occasions we have had to go to the State and request them to bring their proclamations in to conformity or to modify their proclamation to take care of what the Tribal Council has done, feeling that it has the right to do it. Again, to try to protect the guests that come on to the Reservation, maintain and preserve the goodwill of the hunters.

Q. Was that request made for 1977 to your knowledge?

A. It was not, to my knowledge.

Q. It was made in prior years?

A. I think, one occasion.

Q. On at least that one, did the department adjust its season dates to accommodate the Tribe?

A. It did.

Q. Do you know of any case in which any prospective hunter has been, for the 1977 season, has been dissuaded or deterred from hunting on the Mescalero Reservation because of the requirement of the State License or the threat of difficulty with the State?

A. Not of my own knowledge.

MR. DUNIGAN: No further questions, Your Honor.

THE COURT: Rebuttal?

REDIRECT EXAMINATION

BY MR. FETTINGER:

Q. Mr. Wardlaw, are you familiar with the hunting season for antelope on the Reservation?

A. Yes, I am.

Q. Are you familiar with the season for hunting antelope under the law of the State of New Mexico?

A. I am not.

Q. Are you aware that there is a conflict between the seasons?

A. I've heard that there is a conflict today.

Q. And you testified, I believe, that the deer and elk are sold out?

A. They are.

Q. And that the antelope have five, you've sold five permits on antelope?

A. This is what I understand now.

Q. And the conflict in season is in the antelope season between the State and Tribe, is that correct?

A. Yes, sir.

MR. FETTINGER: No further questions, Your Honor.

THE COURT: You may step down.

MR. BLOOM: We call Mr. Butch Blazer.

ARTHUR BUTCH BLAZER

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. BLOOM:

Q. Would you state your name for the record, please?

A. My real name is Arthur L. Blazer. My nickname is Butch.

Q. And what is your connection with the Mescalero Apache Tribe?

A. I am with the Range Conservation, for the Bureau of Indian Affairs, and I work in conjunction with the Mescalero conservation officer in making recommendations to the Tribal Council.

Q. What specifically do you do, what do your duties require? Do you supervise and manage the game management program for the Mescalero Reservation?

A. Yes, I assist the conservation officer in making all surveys and game counts as far as the wildlife and I am responsible for protecting the grazing of the Mescalero Apache Tribe.

Q. What is the purpose of these surveys and studies?

A. To determine number and age and sex of our game animals on the Reservation.

Q. What is the basic purpose of having this knowledge?

A. We conduct these surveys to determine how many animals there are actually on the Reservation. And this correlates with our recommendations that we make to the Tribe as far as bag limits are concerned.

Q. Do these surveys also tell you what the terrain will support?

A. Yes.

Q. You take a survey to determine how many are there and how much more can be supported or how may need to be taken off of it, is that correct?

A. Yes, sir.

Q. And then you make these recommendations to the Tribe?

A. Yes. In conjunction with the conservation officer.

Q. Why, for example in the Tribe situation this year you allow, and have for several years, both a buck and a doe during that particular hunting season for deer, whereas the State only permits buck primarily throughout the State?

A. This is to prevent an overly amount of doe to accumulate and to keep our buck-doe ratios in the correct percentage.

Q. If they get out of balance, what happens?

A. Oh, if the buck-doe ratio gets out of balance, then you have many more doe than you do buck. Then, of course, your reproduction of your fawns is affected to the fact that there aren't enough buck to service the does. And if you do allow the doe to increase over the years, you have an over-population of your deer in general, and this begins to re-create problems.

Q. Does the Mescalero Tribe, then, with your assistance and the assistance of the conservation officer, try to keep a balance here as to what their land will support?

A. Yes.

Q. By keeping this buck-doe ratio at a certain level?

A. Yes. This is the basis for our aerial helicopter count and ground surveys is our whole point. It's based on conservation.

Q. Well, the amount that are recommended to be taken out in a particular deer season, is that also related to your conservation?

A. Why, yes.

Q. For purposes of conserving the hunting and fishing industry?

A. Yes.

Q. All right, sir, are there other uses for this land other than just for game?

A. Yes. The Reservation supports approximately 6,000 head of Hereford cattle.

Q. Is there any determination made as to who many cattle are going to be kept, as to how many deer are going to be allowed to remain or elk are going to be allowed to remain on the Reservation?

A. Yes. There has been surveys done as to the amount of elk and deer that can be run in correlation with our cattle herd.

Q. Do you have a standard of measurement for that?

A. We base our measurement on animal unit months.

Q. What is an animal unit month in regard to cattle?

A. It's the amount of force consumed by a cow in a period of one month.

Q. Like one cow?

A. Yes.

Q. What is the unit in terms of, say, deer or elk?

A. You correlate, you would say that there are approximately six deer equal to one animal unit.

Q. How about elk?

A. Elk, approximately two elk.

Q. In other words, if we eliminated six deer, we could put one more cow in, is that correct?

A. Yes.

Q. If we got rid of two elk, we could put another cow unit on, is that correct?

A. Yes.

Q. How is the supply in terms of horses?

A. This is the big problem on the Reservation right now. We presently have approximately 2400 head of horses on the Reservation. These are Farro horses and they are competing directly with the cattle herd on the Reservation and are located primarily in the same areas that our cattle herd is. The Tribe presently has a contract with—

Q. What is a Farro horse?

A. This is essential a wild horse, but not in the true sense of the word Mustang. It is a horse that is running free and unclaimed.

Q. In terms of the horses that are removed then, more game or more stock, cattle, could be placed on?

A. Correct.

Q. On the Reservation, is that correct?

A. Yes.

Q. Are you familiar with the movement and transfer and release of elk on the Mescalero Reservation in the past?

A. Yes.

Q. Do you have any information by reason of your particular activities with the Tribe as to what the Mescalero Reservation could support in terms of elk, say, in 1964?

A. Approximately 400 head.

Q. How many elk are on that Reservation today?

A. We estimate approximately 1200.

Q. What was the support aspect, from 400 in '64, what has caused the change to enable 1200 to be on the Reservation today?

A. Since that time, we have had a considerable amount of range development on the Reservation creating areas which in the past, in 1964 were unable to support cattle due to unavailability of water. Since that time, many wells have been placed in areas allowing cattle to utilize these areas and bringing the cattle away from the direct competition with the elk in our higher country. In fact, we have, this in fact has created more actual grazing area for the cattle.

Q. If you didn't have elk in the higher country, you couldn't move cattle back up into there then? Is that correct, if the elk were gone, could you replace them with cows?

A. Correct.

Q. Can you tell us why August 29th was the selected date for the commencement of the antelope season on the Mescalero Reservation?

A. Yes. This was to prevent having our conservation officers split between our antelope season and our bear season, and which I believe the bear season begins on September 5th or 6th. And this would, since these two seasons are staggered, this will create a situation where we can have full coverage by all of our conservation officers on each of these hunts.

Q. How many days have been set aside from the antelope hunt commencing August 29th?

A. I believe there are four days.

Q. Four days. And did the State Game and Fish Department contact you or your office at any time in regards to trying to establish common dates in terms of State proclamation as opposed to the Mescalero proclamation?

A. No, they did not.

Q. Did you make any attempt to contact them in the same manner?

A. No.

Q. Why is the period of, whether it's August 29 or September 1st, why is this the best time for setting a hunting date for antelope?

A. The antelope by this time have gotten out of their running season. We have completed all of our counts as to the antelope, and generally, they are just ready to hunt by that time.

Q. When was this antelope season established? When were the dates picked?

A. This, I believe, was around the middle of March.

Q. The middle of March?

A. Yes.

MR. BLOOM: I pass the witness.

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Blazer, how long have you been involved in game management?

A. I have been working for the Bureau of Indian Affairs for approximately one and a half years.

Q. Do you have a degree in wildlife management?

A. No, I have a Degree in range management.

Q. Your duties with the BIA, though, include not only range management concerns but game management as well?

A. Yes.

Q. What technique is used to survey elk, deer, and antelope in your work?

A. Our elk, deer, and antelope, on all three of these animals, we use aerial surveys to get a correct ratio of both sex and age of the animals. And the aerial surveys primarily are used also in counting actual numbers of elk and antelope. On our deer, we have what we call a deer density index, which we run these, they are samples that detect seasonal changes and actual deer trend numbers from year to year. These are taken twice a year.

Q. Are these techniques such as would permit an accurate estimate of the total population of elk and deer?

A. Yes.

Q. You mentioned, Mr. Blazer, that the number of cattle on the Reservation and the number of horses on the Reservation are of necessity taken into account by yourself and the Tribal conservation officer in arriving at a recommendation to make to the Tribal Council concerning bag limits and season dates for the various wildlife, is that correct?

A. Yes.

Q. And that the higher the number of game that are taken the more the Reservation can accommodate, more horses or more cattle, is that right?

A. More cattle.

Q. Are you aware of any study presently being conducted or contemplated to abolish the wildlife program entirely on the Mescalero Reservation?

A. Could you repeat that?

Q. Are you aware of any study presently being conducted or contemplated to do away with the wildlife program on the Reservation entirely?

A. No, I am not.

Q. But if there was such a program, you are not involved in it?

A. If there is such a program?

MR. BLOOM: He already said he didn't know, Your Honor. He can't be involved in something he doesn't know.

Q. (By Mr. Dunigan) If there were such a program being conducted now, would you be involved in it, do you think?

MR. BLOOM: I object. I think this is calling for pure speculation.

THE COURT: It's the same question.

MR. DUNIGAN: I have no further questions.

THE COURT: Rebuttal?

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Mr. Blazer, how long have you lived on the Reservation?

A. Except for the period of time from the age of nine months until three years, approximately two years, and for a period of three years when I was attending college in Los Cruces, I have lived there all my life.

Q. You have lived on the Reservation all your life. All right, are you a member of the Mescalero Apache Tribe?

A. Yes.

MR. BLOOM: No further questions.

THE COURT: You may step down.

MR. BLOOM: Your Honor, we would call Mr. Robert Thompson.

ROBERT THOMPSON

was called as a witness herein by the Plaintiff, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. BLOOM:

Q. Would you state your name for the record, please, sir?

A. Robert R. Thompson.

Q. By whom are you employed?

A. The Mescalero Apache Tribe.

Q. in what capacity?

A. As a director of enforcement services. I direct the police force and the conservation program.

Q. As the director in that capacity, do you have anything to do with the enforcement of the Mescalero game and fish regulations on the Reservation?

A. Yes, sir.

Q. And what part do you play in that regard?

A. We direct the conservation officers and I have been employed in this capacity since last November. We patrol the areas in which hunts are being conducted to see that hunters are conforming with the regulations specified by the Tribe.

Q. Now, is there some method or manner that is in effect for identifying game after it has been taken on the Reservation?

A. Yes, sir. We require that the Mescalero Apache Game Tag be attached to the animal.

Q. Where do these game tags come from?

A. They are supplied with our Tribal license. They are attached just like the tags are on the State Game License.

Q. They are in fact a part of the license then, are they not?

A. That is correct.

Q. And are there game tags for each of the types of game that are to be hunted as their particular season comes up, for deer, bear, elk, antelope?

A. Yes, sir. And on the regular deer licenses where there are two deer, there's both a buck and a doe tag.

Q. The State of New Mexico would have no problems in terms of ascertaining that this animal was taken from the Reservation after it had left the Reservation if that tag was attached then, would it?

A. That is correct.

Q. Mr. Thompson, you have been on the Reservation more than just this last year and a half that you stated that you have been in this present capacity, have you not?

A. That is correct.

Q. How long actually were you, or have you been on the Reservation?

A. I was formerly employed as a criminal investigator for the Bureau of Indian Affairs for 20 years. During that time, I was employed at Mescalero from 1959 to 1967. I subsequently have been back almost every year during the hunting season to assist them with their enforcement on the Reservation.

Q. Over the number of years of experience, in addition to the last year and a half since you returned to the Reservation, do you know what the State's activities have been in regard to

aiding, assisting, supervising, or anything else in regard to hunting or fishing or anything else on the Mescalero Reservation?

A. Many years ago when I first went to Mescalero, and I was one of them that helped to get the hunting program started at Mescalero for non-Indians, we endeavored in every way to cooperate with the State. And in fact, it was our suggestion or my suggestion at that time that we require a State hunting license before we would issue a Tribal license. There has been some good cooperation with the State, various officers, Mr. Owens and I have known each other personally for 20 years. Charlie Byrd and I have known each other for a long time. We have had some sorry experiences with some of the State game people. A man named Cockrell arrested a Mescalero Apache Indian leaving Eagle Creek to bring a deer back to Mescalero. There is no other way to get to the Reservation residence area from Eagle Creek except to leave the Reservation through Ruidoso and back into the Reservation. Cockrell arrested the man. The animal was impounded, the man was fined, and the money was never recovered, nor the deer. During the year I was at Mescalero, Owens used to occasionally drop through Silver Canyon and down lower Elk Road to assist in spotlighters and so forth and control of them. But this was prior to our adopting the program that we have now where we have seven conservation officers on the Reservation full time. Some of these people work at night. We have got more than a hundred radio-equipped cars patrolling that Reservation during the day and part of the night. We are not asking the State to come in and assist us now, but at one time there was cooperation to an extent.

Q. That was some 15 years ago then, was it not?

A. That is correct.

MR. BLOOM: Pass the witness, Your Honor.

THE COURT: Mr. Dunigan?

CROSS-EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Thompson, are you a member of the Mescalero Apache Tribe?

A. I am not.

Q. You are not an Indian?

A. I am not.

Q. Mr. Thompson, do you and your subordinates enforce the Mescalero Apache Tribal ordinances or regulations pertaining to hunting and fishing on the Reservation against non-Indians?

A. We do. After this year, the Tribal ordinance allows for us to cite people to the Tribal Court. We haven't started doing this yet.

Q. There has never been a case in your experience in which that has been done?

A. At Mescalero?

A. Yes.

A. Not at Mescalero. But there have been numbers of cases in the night circuit and in the State of Arizona where people have been cited to tribal court.

Q. To whom do you have reference?

A. Pardon?

Q. You are using the term "people have been cited"?

A. Non-Indians. There is a night circuit court opinion on this that has been—

Q. Let me ask you, Mr. Thompson, in your experience on the Mescalero Reservation in the past at least the Tribal ordinances and regulations have not been enforced against non-Indians?

A. Not against non-Indians. We have cited people to magistrate's court in the past. However, Mr. Jordan, the attorney for the Defendant, recently has asked for a dismissal and got it based on the fact the magistrate had no authority or jurisdiction over non-Indians arrested on the Mescalero Apache Indian Reservation except on traffic citations.

Q. Is it your experience, or have you been instructed for the 1977 season to attempt to enforce the Tribal ordinances and regulations pertaining to hunting and fishing against non-Indians on the Reservation?

A. The proclamation states it will be enforced. I haven't been instructed to do that personally, but the proclamation does say so.

Q. Against non-Indians?

A. That is correct.

Q. And does the proclamation provide for fines to be levied whether Indian or non-Indian?

A. That is correct.

Q. Is it your intention as the chief or director of the conservation police force to personally and through instruction to your subordinates to enforce these ordinances against non-Indians?

A. If I am instructed to enforce these ordinances, I will enforce them, and we will have a Tenth Circuit opinion in addition to that other one, one way or another.

Q. But you have not been so instructed to date?

A. As of this date, no.

MR. DUNIGAN: Thank you. No further questions, Your Honor.

THE COURT: Redirect?

REDIRECT EXAMINATION

BY MR. BLOOM:

Q. Mr. Thompson, you have enforced Mescalero regulations in the past, have you not?

A. That is correct.

Q. What court did you cite them?

A. Depending on the nationality of the person involved, an Indian went to Tribal Court; a non-Indian went to a State magistrate, or in some cases, we cite them to the Federal magistrate for Federal, U. S.

Q. Pursuant to 18 U.S.C., 1165?

A. 65, yes, sir.

Q. You use a standard United States violation citation for that, do you not, for non-Indians or Indians?

A. In the past we signed complaints before either the U. S. Commisioner or now the U. S. Magistrate. However, recently we do have citation books which are a penalty assessment type, and they are mailed to Denver.

Q. These are a Federal citation?

A. That is correct.

Q. I hand you what has been marked as Plaintiff's Exhibit 17 and ask if you can identify that, sir?

A. This is a copy of a violation notice to the United States District Court.

Q. These citations can and are issued for violations of Tribal ordinances, are they not, on regulations in hunting and fishing areas?

A. They could be issued for a violation of a Tribal ordinance, if that ordinance, if it goes to Federal court, now it's a penalty assessment, but if the Tribal ordinance conforms with this, yes.

MR. BLOOM: I move for the introduction of Plaintiff's Exhibit 17.

THE COURT: Any objection?

MR. DUNIGAN: No objection.

THE COURT: It will be admitted. (Plaintiff's Exhibit 17 was admitted into evidence.)

MR. BLOOM: I have no further questions.

THE COURT: You may step down.

MR. BLOOM: The Plaintiff will rest at this time, Your Honor.

THE COURT: Mr. Dunigan, do you have testimony?

MR. DUNIGAN: We will call Mr. William S. Huey.

WILLIAM S. HUEY

was called as a witness herein by the Defendant, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Will you state your name and address, please?

A. William S. Huey, Santa Fe, New Mexico.

Q. What is your occupation, Mr. Huey?

TRANSCRIPT OF PROCEEDINGS

April 25, 1978

(Trial on merits)

MYRA ELLEN JENKINS,

was called as a witness herein by the Defendants, and after having been duly sworn, testified upon her oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Would you state your name and address, please?

A. Myra Ellen Jenkins, 1022 Don Cubero, Santa Fe.

Q. What is your occupation, Mrs. Jenkins?

A. I'm Chief of the Historical Services Division of the State Records Center, and hence, in charge of the official archives of New Mexico. I am also State Historian.

Q. Would you outline, for the Court, your educational background and professional training?

THE COURT: I don't believe it's necessary to, unless Mr. Fettinger wishes to hear it.

MR. FETTINGER: No, sir.

THE COURT: I think the qualifications are recognized.

MR. DUNIGAN: All right, sir.

Q. (By Mr. Dunigan) You serve, in short, as State Historian, do you not, Dr. Jenkins?

A. Yes.

Q. Dr. Jenkins, the Court is taking Judicial Notice of the fact that the Mescalero Indian bands were present in the area of

the Mescalero Apache Reservation for a period prior to the Treaty between the Tribe and the United States, entered into on July 1 of 1852. Would you describe for the Court what was the character and/or the style of the Indian occupation of this territory at this time, at the time of the Treaty of 1852, and prior to that?

A. You're speaking of the Apache?

Q. Yes.

A. Yes sir. The Apaches, there were large numbers of them in New Mexico of various groups, generally known as the Eastern or the Western Apache. The Eastern Apache, by the time of the U. S. occupation consisted of the Mescalero, and generally, all of the bands associated with the Eastern Apache, and their range was considered to be Eastern Rio Grande, and were generally considered by one generic name as Mescalero. The Western Apache had various designations, mostly by the the specific alliances which they live by. The Mescalero are generally known by the name of the leaders of the band. They were bands of Indians with an acknowledged chieftain, and they obviously, certainly acted in concert, in alliance together, but there was no one framework of Tribal Government, as we know it today, at that time, for the Apaches.

Q. There were small bands of Apaches which ranged over a large area of the Southwest, including New Mexico, and other states?

A. This is true certainly of the Mescaleros of Eastern Texas, and, of course, down into Mexico and New Mexico; the Western Apache in New Mexico, Arizona, largely.

Q. Now, the Mescalero Apache, as I understand your testimony, is east of the Rio Grande?

A. Yes, sir. This is generally considered to be what anthropologists or historians call the range of the Mescaleros, and generally boundaried roughly on the north by the Sierra Blanca, and on the east by the Pecos River.

Q. Would it have included a much larger area than what is presently the Mescalero Reservation?

A. Oh, yes, indeed, sir.

Q. Did the Mescalero Apache want, at that time, to establish any settlements or communities in New Mexico?

A. Actual settlements or communities, no, there were certain places where the individual bands, traditional places, where, for periods of time, they had encampments. There had been a few attempts by the Mexican authorities and the Spanish authorities to get the various Comanches to establish a village form, and the like, but this was not their way of life.

Q. Would you describe their system of social and political organization?

A. Sir, I'm not sure that I'm competent to do so. That's more of an anthropologist's position. Historically, as I say, the documents, as they are, in many respects on the actual entries of the workings of the Apache bands' growth are rather silent. Historically, as I say, they seem to have operated in relatively small bands under the leadership of, I presume, a leader of their own choice; certainly, one who would have commanded their respect and they did follow him.

Q. And rather than establish settlements or communities, they would roam from time-to-time, seasons-to-seasons over a large area?

A. This is true.

Q. And this was the situation prevailing in 1852, the year of the Treaty with the United States?

A. Yes, sir, that was the situation.

Q. For the purposes of your testimony in this case, Dr. Jenkins, have you examined the Treaty of 1852 between the Mescalero and the United States?

A. Yes, sir.

Q. What was the situation in the territory of New Mexico, with regard to the relationship between the United States and the Indians at the time of the signing of that Treaty?

A. Sir, it was extremely tense between the; well, not perhaps between the United States Government. Certainly, it was extremely tense between the non-Indians who were in the

area and the Indians because of all of the Tribes, that is, all but the Pueblos, because after U. S. occupation, and finally, the signing of the Treaty of Guadalupe Hidalgo, and the California Gold Rush, and the flocking of non-Indians in the territory, the discovery of mines; well, in the southwestern part of New Mexico, this created a situation of extreme tenseness. There were a great many confrontations, because certainly, the Apache, not only the Mescalero, but even more so, the Western Apache felt themselves being obviously pushed out of their traditional areas, and out of their traditional pursuits by miners and gold-seekers and the United States Army, who was attempting to guard the main routes of trade, the Del Mar Route, the Stage Coach Routes, and other routes through New Mexico. It was a very tense and very serious situation.

Q. It was tense with a number of Tribes, not with just the Mescaleros?

A. That is true. It's tense with all, particularly, with all of the Apache Tribes after the Guadalupe Hidalgo.

Q. So, the United States sought to enter into treaties with these various Indian groups, Mescaleros and others, too?

A. Actually, sir, the person who really sought to enter into the Treaty, particularly in the 1852 and in the 1865 Treaties, was the Governor of New Mexico, the Territorial Governor. There was, at the time, of course, with New Mexico being a territory; there is a conflict still, between who really has the ultimate authority to settle.

The Governor was a part of the conflict with the Commanding Officer of the Military District in New Mexico, and this often complicated the situation both with respect to political affairs and particularly with respect to Indian control, because civil Governors, beginning with Calhoun who had to Return East because he wasn't well enough to carry out his mission, and followed by Greiner, as Acting Governor, until the arrival of William Carr, attempted for the most part, and were much more interested in trying to secure treaties of peace, and come to some sort of a notice of vendee with the Tribe, and where the military officials, of course, duty was to protect the

people, to keep the peace, and to try to protect the settlers and so on, and they were by no means complementary, I would say that by majority, the Civil Governors were the ones who attempted to make the peace treaties.

Q. The objective on the part of the Civil Governors was to strike a peaceful situation with the various Indian groups, who were in a hostile posture with the emerging settlements in the area?

MR. GOTTSCHALK: Your Honor, I would like to register an objection to Mr. Dunigan's leading of the witness. She's an expert, and I think she doesn't need to be led along to the appropriate conclusion. She's well able to answer a simple question.

THE COURT: I don't see any real problem with it, under the circumstances. Go ahead, Mr. Dunigan.

Q. (By Mr. Dunigan) Did you have an opportunity to answer that question?

A. I'm sorry, sir, you lost me. Would you repeat your question?

Q. Describe, then, in short, the purpose of the Treaty of July 1, 1852 between the United States and the Mescaleros.

A. Well, of all of the treaties, and particularly with the Mescalero, certainly it's to try to stop the killing, try to stop the conflict, and actually from some of the notations which went on in advance of the Treaty, part of it, certainly on the part of the civilian government, was actually in an attempt to protect the Indians from some of the outrages against them.

Q. Was the Treaty of July 1, 1852, patterned after any other treaties of that era?

A. Yes, sir. Mr. Greiner states, specifically, that in drawing up the Treaty, he had relied on the 1849 Treaty with the Navajo, and with the Utes, with the Mouache Utes.

Q. Were all of those prior treaties also for the purpose of bringing peace and friendship among the people in that area?

A. Yes, sir, they were for peace and friendship. Also, I might point out that all of the treaties, for one of their bases, was an attempt to return captives. They were all treaties of peace and friendship.

Q. Do you have a copy of the 1852 Treaty?

A. Yes, sir.

Q. I believe it's in evidence as Exhibit—

MR. FETTINGER: 24.

Q. (By Mr. Dunigan) —24.

A. I have several copies of the Treaty, do you want the printed one?

Q. Is that with reference to the Treaty of 1852, Article 2 thereof? Is that the significance of the recital in Article 2?

A. Of peace and friendship, yes. "From and after the signing of this Treaty, hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist."

Q. Does the Treaty of July 1, 1852, grant to the Mescalero, any organizational or territorial status?

MR. GOTTSCHALK: Objection, Your Honor, I think that calls for a legal conclusion. I don't think she's been qualified as a legal expert in this field. We'll make the appropriate legal argument as to the effect of the language in the Treaty.

THE COURT: She may answer.

A. Would you repeat that, Mr. Dunigan, please?

Q. (By Mr. Dunigan) Does the Treaty of July 1, 1852, grant any organizational or territorial status to the Mescalero?

A. It doesn't grant any organizational status, I would say, no. It does state, however, that as soon as possible, the U. S. should designate, settle, and adjust territorial boundaries.

Q. Does it establish a Reservation?

A. No, sir.

Q. After this Treaty was signed, Dr. Jenkins, what followed from there? Was there any change in the pattern and practice of the Mescalero to roam the areas you've described?

A. No, sir, because there was nothing in the Treaty that would have prevented them, in any way, from staying in their traditional homelands.

Unfortunately, the situation did not materially improve. For one thing, Congress delayed some time in ratifying the Treaty, from the summer of 1852 until March. And in the meantime, there were incidents, again, on both sides; but certainly of confrontation and accusations against the Mescaleros for theft of stock, and accusations by the Mescaleros against the non-Indians for theft of stock, their stock, and so on.

Actually, however, again, the situation was much more tense with the Western Apache, whose land lay at fork really with the trade routes than it was with the Mescalero, and there continued to be confrontations. So that, William Carr and his successor, David Meriweather, again, Territorial Governors attempted again to get actual treaties. As a matter of fact, Carr signed with El Mimbrenos, and then came the six Treaties which Governor Meriweather negotiated in 1855. One was with the Mescaleros, with Cuentas Azules' name appearing on it.

Q. Before we get there, Dr. Jenkins, as I understand it, after the Treaty of 1852 was signed, the Mescalero neither voluntarily nor otherwise settled in one place in this area?

A. No, sir, there was no reason why they should. There was no implication that they had to.

Q. And no Reservation was set aside for them?

A. No, sir.

Q. Then, as I understand your testimony, during this period, hostility and friction continued, and there were deprivations of various kinds occurring on the part of the Mescaleros and non-Indians, both, in this area?

A. This is true. I would say in that situation, it was much more tense with the Western, but it was also true of the Mescalero, yes.

Q. So, the basic purpose of the 1852 Treaty, did not seem to be availing at that time?

A. That is true.

Q. Now, as I believe you've indicated, another Treaty was entered into by the Mescaleros and the United States, is that true, in 1855?

A. Yes, sir. It was never, however, ratified. It was entered into by David Meriweather in March, but not ratified.

A. Did you say it was not ratified?

A. No, sir.

Q. So, it never became operational?

A. No, sir. It was one of six that were signed that year.

A. What was the purpose of that Treaty?

A. The purpose of that Treaty was primarily a try on the part of Governor Meriweather, and very probably on the part of the military, too, that if there could be—actually Reservations would be designated, then, it would be a situation in which it could be much more easily controlled. In other words, could control the non-White aggressors, and certainly the Indians for purposes of pacification and so on. It would resolve the situation much more clearly.

A. The Treaty of 1855, then, which although signed was not ratified, did establish a Reservation for the Mescalero Apache Tribe?

A. Yes, sir, it did. A larger Reservation than would be in the case today.

Q. Did the proposed Reservation in that 1855 Treaty, if you know, include any parts of the present Mescalero Apache Reservation?

A. Mr. Dunigan, I have drawn a very amateurish map from that Treaty, and attempted to put the lines on a highway map, and it does include the southern portion of the present Mescalero Reservation, and it is—

MR. GOTTSCHALK: Your Honor, at this time, I would interpose an objection, based on relevancy. I don't feel the 1855, or any proposed treaty, has any relevancy to the laws, considering the fact that it was not ratified. We do have a Treaty that was ratified, and the Reservation that was established, and all of this material is irrelevant.

THE COURT: Fine, it will be utilized.

Q. (By Mr. Dunigan) Dr. Jenkins, although the proposed Treaty of 1855 set out a Reservation for the Mescaleros, were the Mescalero bands ever situated on the Reservation, as a community?

A. Well, they still, many of them, of the bands, were still—of course, this is right within their homelands, for example, Dog Canyon, and this is one of the traditional areas, and they continued, obviously, to inhabit the same general areas which they had before.

Q. But they were not settled there by the Government?

A. No, sir.

Q. Was a Reservation established for the Mescaleros in 1864 by Presidential Executive Order?

A. An Executive Order, in 1864, established the Bosque Redondo Reservation, which was to be for both the Navajo and Mescalero. There was no Treaty with them because they had no choice. It was either go or else becoming exterminated, according to the Army Commands.

Q. Is the Bosque Redondo located in the area where the Mescalero bands normally roamed?

A. Yes, some of them would have gone that far, probably would have roamed that far north, Montezumas, but that is, they certainly would have preyed for whatever purposes, and not particularly occupying the area, constantly.

Q. Why was this Reservation considered necessary?

A. It was considered necessary. In the intervening years, the Civil War had come into New Mexico, and, of course, with the removal of many of the Federal Officers, or many saw fit to

join the Confederacy, and had left New Mexico. And then, with the invasion of the Confederates from Texas, and finally, the rather successful conclusion of the Civil War, however, of course, resulted in the Armed Forces that had been established for Indian protection, and the Army Patrols, the Army for Indians, had to be totally redrawn because of the sectional difference as a result of which tempers really flared more, and there were many more Indian confrontations and difficulties.

And then, in the summer of 1862, James H. Carr arrived in New Mexico, the end of the sectional controversies with the California volunteers, and he very quickly replaced Kennedy, and turns his attention immediately to the so-called "Indian problem."

The two that he considered to be the most dangerous, were the Navajo and the Mescalero, and the Army forced on Indians. Carson, the head of New Mexico Militia, was ordered to round up the Mescalero and the Navajo, and place them on the Bosque Redondo Reservation. Many of the Tribes actually came in for protection because of the harassment of the Army, and in fear. Actually, however, there were troubles on the Reservation between the Navajos and the Mescaleros, and the land was quite horrible. The situation was almost impossible, and I think it was in November of 1865, the Mescalero decamped in the night.

Q. Had it been the intention, when this Reservation was established in 1864, that it would be the permanent home of the Mescalero bands?

A. Well, actually, I think it would probably be much more accurate to say that it was simply a way of military control of the Indians. Yes, there were supposed to be, land was to be farmed and seeds were to be furnished, and equipment was to be furnished. But obviously, the area was not large enough, nor fertile enough to provide for a Reservation, its military control.

Q. In any event, the Mescalero withdrew from the Reservation the following year?

A. They definitely, literally took off in the night, all but nine of them.

Q. And then, what did they resume doing at that time?

A. Well, they returned to their traditional areas. Cadette, who had replaced his father, Barranquito, goes east of the Sacramento, in East Texas, and the other bands had scattered into their known territories, and Dog Canyon. Others had scattered to their traditional homelands. However, about this time, about the end of the Civil War, and with the end of the sectional controversies, you had a great many more settlers, particularly in the Tularosa area, from the Rio Grande settlement, there being a serious flood, and whatnot, and the Indians actually surfaced, wanting to be Mescaleros, and, of course, were much more sinned against than being sinners. There were many more attacks on their herds, and people moving into their land than there were vice versa. But nevertheless, it was again a very serious confrontation, a very serious situation with the homes, with the settlers, of course, very interested in the lands, and the Indians obviously interested in attempting to carry on their way of life.

Q. Did these circumstances continue, then, until the Executive Order of 1873, which established the original boundaries of the present Mescalero Apache Reservation?

A. It continued until then, and actually, it continued even further. Until, well, probably consummating in the so called Disarmament Order by Colonel Patch in 1880, of the entire Mescalero Tribe, as I said, probably because the situation was complicated by not only, as I say, increased immigration, the fact that many of the Mescaleros did not stay, small groups of them did not stay on the Reservation, and by the fact that their ally, the Great Mimbreno Victorio, in 1879 and 1880 is in and out of the Mescalero Reservation. And whatever merits the charge and so on, many of the Mescaleros were given the blame by the military for some of the deprivations committed by Victorio, et cetera, and came the disarmament of the Mescaleros in 1880. Afterwards, things were relatively calm. Of course, this is nothing that is uncommon to one, it's a situation with most of the Reservations.

Q. How were the Mescalero bands located on the Reservation in 1873, was a military campaign waged to situate them there, or did they come voluntarily, or what was the situation?

A. Most of them came in voluntarily, as I said, because, for one thing, and they certainly offered them a great deal of protection than they had had otherwise, both from the military and from settlers and from bands which literally preyed on the Mescaleros. Many of them came in voluntarily. As a matter of fact, Cadette had always been at Bosque Redondo, and was very interested in bringing in his band, and one of the things that caused them to accept the situation, was the murder of Cadette at the Bosque in 1872, just before the Executive Order was created.

Q. Was the establishment of the 1873 Reservation, now, in your judgment, a necessary, inexorable result of the Treaty of 1852?

MR. GOTTSCHALK: Objection, Your Honor, that calls for a legal conclusion.

THE COURT: She may answer.

A. I don't think it has anything to do with the Treaty of 1852.

Q. (By Mr. Dunigan) The Executive Order of 1873 did no more than establish certain boundaries for a Reservation on which the Mescaleros were situated?

A. This is correct, it was modified several times after that.

Q. In other words, Doctor, in your judgment, the 1873 Reservation is not tantamount to a Treaty Reservation?

A. No, sir.

MR GOTTSCHALK: Objection, legal conclusion.

Q. (By Mr. Dunigan) And you mentioned, I believe, Doctor, that the boundaries of this Reservation have been changed from time-to-time since 1873?

A. Yes, it's been modified, I believe, the last time was 1887; several times.

Q. Doctor, does the Treaty of 1852, or the Executive Order of 1873, grant title to any lands to the Mescalero Apache Tribe?

MR. GOTTSCHALK: Objection, Your Honor, calls for a legal conclusion, again.

THE COURT: She may answer.

A. Certainly, the Treaty of 1852 does not. I'm not familiar with the Executive Order Reservation, or of the particular difference, but certainly, the 1852 Treaty does not.

Q. (By Mr. Dunigan) Does the Treaty of 1852, grant to the Mescalero Apache Tribe, exclusive hunting and fishing rights, or title to fish and wildlife on the Reservation?

A. It does not mention, sir,—

MR. GOTTSCHALK: Objection, Your Honor. First of all, it calls for a legal conclusion. Secondly, the Treaty is in evidence. The language will speak for itself, if it mentioned hunting and fishing, et cetera; if it doesn't, the legal argument will have to be made from the language that exhibit contains.

THE COURT: She may answer.

A. There is no such language in the Treaty, sir.

Q. (by Mr. Dunigan) Does the Treaty, or the Executive Order of 1873 mention anything about retained or aboriginal rights of any kind, on the part of the Mescalero Apache Tribe?

MR. GOTTSCHALK: Your Honor, in order to not keep interrupting, I would like to have a continuing objection to all questions relating to the questions of the Executive Order, and any interpretation thereof, so I would not have to continue to object.

THE COURT: You may.

MR. DUNIGAN: May the witness answer, Your Honor?

THE COURT: Yes.

A. Would you repeat the question?

Q. (By Mr. Dunigan) Does either the Treaty of 1852, or the Executive Order of 1873, mention anything about any retained or aboriginal title or rights of any kind, on the part of the Mescalero Apache Tribe, with reference to the Reservation?

A. There is no such language in the 1852 Treaty. The Executive Order, I do not have before me.

Q. Let me ask you this, Doctor, if you know, was it historically, was it the practice or intent or understanding of the parties to the Treaties entered into, at this time, that the Indians were to retain any aboriginal rights of any kind, by virtue of these Treaties?

MR. GOTTSCHALK: Same objection.

THE COURT: Go ahead.

A. I'm not quite sure I understand your question, Mr. Dunigan.

Q. (By Mr. Dunigan) Well, as a historical matter, was it customary for the Treaties of this period to confer upon the Indians any aboriginal rights or titles of any kind, and if so, would that be expressly stated in the Treaties?

A. I'm not sure about aboriginal titles, this is before Indian claims cases, and so on, but certainly, the Treaties, that's the Tapeguache Utes in 1863, and the Fort Sumner Reservation Treaty with the Navajos, do specify, and the 1855 unratified, that the Indians seek the title that they have to the general areas, in return for the reservationed right to the Reservations, and they specify, of course, not only the Reservation boundaries, but the terms and the Reservation itself.

Q. The Treaty of 1852 between the Mescaleros and the United States does not so specify?

A. No, sir.

Q. Historically, Dr. Jenkins, did the Treaties of that era confer upon the Indians any jurisdiction or authorities over non-Indians on the Reservation?

A. No, sir.

Q. Was the 1873 Reservation, as changed from time-to-time by subsequent Executive Orders, still in existence in 1912 when New Mexico became a State?

A. No, sir.

Q. Was the territory of the Reservation included among the lands granted to the State of New Mexico by the New Mexico Enabling Act?

MR. GOTTSCHALK: Objection, Your Honor, it's irrelevant and calls for a legal conclusion.

THE COURT: She may answer.

A. It is not so. The Reservation, none of the Reservations are excluded from that, to my knowledge.

Q. (By Mr. Dunigan) As a historical matter, Dr. Jenkins, if you can answer this, was the method of creating an exclusive Federal Indian enclave within a territory which was to become a State clearly established by 1912, for example?

A. Well, certainly, it had been established ever since the Reservation had been created, and, of course, the struggle for the State of New Mexico was a long and tortured one, and I doubt if that question had even arisen, but certainly, many other Reservations were created within territories which later became States. They were then considered certainly within that State's boundaries, politically. Specifically, that is from a geographical point of view.

Q. May I ask you this, if it had been the intention of the United States to exclude the Mescalero Apache Reservation granted to the State of New Mexico, how would that have been accomplished, if you know? Was there a procedure for that, that was clearly established at the time of the entry of New Mexico into statehood?

A. Sir, I don't know, I don't. I, certainly, have no knowledge in that area.

MR. DUNIGAN: Fine. No further questions.

THE COURT: Mr. Gottschalk.

CROSS-EXAMINATION

BY MR. GOTTSCHALK:

Q. Dr. Jenkins, I want to avoid any legal questions, and so, I want to restrict my questions to historical facts, and ask you, whether as a historical fact, you are aware of any abrogation of the Treaty of July 1st, 1852, either by the President of the United States, or by Congress. By that, I do not mean—I realize you've testified there was further confrontation after the Treaty. Not after that, I mean, after, whether you know of any historical documents or statutes passed after that time, which abrogated the Treaty of July 1st, 1852?

A. No, sir, I do not.

Q. I gathered from your testimony, or inferred from it that Cuentas Azules with a Mescalero, is that correct?

A. Yes.

Q. And his name is one of those names appearing on the Treaty, is that correct?

A. His name is one of those names appearing on the Treaty, yes.

Q. And from your—excuse me, I'm sorry.

A. Yes.

Q. From your knowledge of the Indians of that time period, was Capitan Vuelta also a Mescalero?

A. Oh, yes, sir.

Q. And was Negrito also a Mescalero?

A. Well, there is a Negrito who was a Mescalero. There are several Western Apaches with the name of Negrito. There is a Negrito, yes.

Q. And at the time of the signing of the Treaty in 1852, there was considerable reference in correspondence between officials at the time that a Treaty was to be entered into with the Mescaleros, is that correct?

A. Oh, yes. The strange thing is that the four of the five who are signing, were not, are not mentioned on the Treaty. But, yes, there are four or five that Greiner says, specifically, signed their names, and do not appear on the Treaty, Negrito, Francisco, and a couple of the others.

Q. How about Mangas Coloradas, what Tribe did he belong to?

A. Mangas Coloradas is a Copper Mine Gila Apache, he's Western Apache.

Q. Is that a subgroup of the Chiricahua?

A. No, sir. As a matter of fact, it's probably pretty much the other way around. The Mimbrenos, or the Gila Apache, as I said, the bands in most of the area which they inhabited, most of them actually look to Mangas Coloradas, until after his killing, as the leader, although they, too, operated rather independently.

Q. How about Blancito, do you know what Tribe or affiliation he had?

A. I have no idea, sir, I have not come across him at all.

Q. Capitan Simon?

A. No.

Q. Would it be fair to say that the one place you might have some inkling as to what Tribe they belonged to, is the fact that their names appear on the Treaty, a contemporary document was stated to be entered into with the Mescaleros?

A. That is what the Treaty states, yes, sir.

Q. So that some of that evidence would at least indicate, however, inconclusively, that they might be Mescaleros, is that correct?

A. That's correct.

Q. If you know, could you tell me whether, in your opinion, in that time period, the Mescaleros tended to be fluent in English?

A. No, sir.

Q. Did they read or write?

A. Now, some, well, there may have been some that couldn't. Certainly, some obviously picked up some English, probably more of them actually spoke Spanish than did English.

Q. By and large it would be very unlikely that they could read the Treaty of July 1st, 1852?

A. That's right. They put their "X" on the Treaty, yes.

Q. I believe as I understood your testimony, that after the Treaty of July 1st, 1852, the Mescaleros continued to roam in the same aboriginal homelands that they had roamed in previous to the signing of the Treaty, is that correct?

A. I don't believe I used aboriginal, but the same historic range, yes, sir.

Q. They did, in fact, draw their subsistence from that area, they got their food from that area, they lived in that area?

A. Oh, yes, sir.

MR. GOTTSCHALK: May I have one second?

Q. (By Mr. Gottschalk) Just one last question. The present Reservation, as it is presently constituted, is in what you call their historical range, is that correct,—

A. Yes, sir.

Q. —and what I call their aboriginal home?

A. Yes, sir.

MR. GOTTSCHALK: Thank you.

THE COURT: Rebuttal?

MR. DUNIGAN: I have no further questions of this witness, Your Honor. I do have two exhibits which we would propose which are pertinent to her testimony. One being the Treaty with the Mescalero Apache Tribe of June 24th, 1855, which was executed, but not ratified. And an Executive Order of March 2nd, 1909, which I don't believe is included among

those which have been offered by the Plaintiff. And I would like to offer those at this time, Your Honor.

THE COURT: Any objection?

MR. GOTTSCHALK: Yes, Your Honor, we would object to both. Number one: the Treaty being offered was not ratified, and number two, the 1909 Executive Order has no relevancy to the lawsuit, because there was a subsequent Executive Order, which is in our list of exhibits, which in effect, made the 1909 Executive Order null and void.

THE COURT: They will be admitted. You may step down, Doctor.

Have you identified those, Mr. Dunigan?

MR. DUNIGAN: Yes, Your Honor. The State's Exhibit A would be the 1855 Treaty, and Exhibit B would be the 1909 Executive Order.

THE COURT: All right, sir.

MR. DUNIGAN: We call Mr. William S. Huey.

WILLIAM S. HUEY,

was called as a witness herein by the Defendants, and after having been duly sworn, testified upon his oath as follows, to-wit:

DIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Would you state your full name and address for the record, please?

A. My name is William S. Huey, I live in Tesuque, New Mexico.

Q. Are you the same William S. Huey, who testified previously in this cause at the hearing held on the Plaintiff's Motion for Preliminary Injunction?

A. I am.

Q. Is your educational background, professional training, the same today as it was at that time?

A. That's correct.

Q. I believe one significant event that has occurred, however, in that regard, Mr. Huey, since the last hearing, is your appointment as Secretary of the Department of Natural Resources?

A. That's correct.

Q. By virtue of that, you are a member of the Governor's Cabinet of the State of New Mexico?

A. That's correct.

Q. The Department of Game and Fish, which you were formerly the Director of, is now a division under your jurisdiction?

A. The Department of Game and Fish is a Department which is administratively attached to the Department of Natural Resources.

Q. You're aware, are you not, Mr. Huey, that a stipulation has been entered into between the parties to this lawsuit, which specifies certain facts which have been agreed upon between the parties?

A. Yes.

Q. That stipulation, Mr. Huey, relates, in part, that in 1966, 1967, there was an importation of 162 elk, approximately, from Wyoming to the Mescalero Apache Reservation. The stipulation provides that the elk were donated to the Mescalero Apache Tribe by the National Park Services, and New Mexico issued a permit—the State of New Mexico issued a permit for the importation.

Q. Would you relate to the Court how and when this idea of the importation of elk came about? Was it an idea that originated in the mid-sixties, or was it a matter that the Department had been concerned about previous to that?

A. The files of the Department indicate discussions of the transplanting of elk, or the release of elk on the Mescalero

Apache Reservation as far back as 1932. There is correspondence between the U.S. Forest Service, and Elliott Barker, who was the Director of the Department at that time, correspondence between the Bureau of Indian Affairs, and one of the members of the State Legislature at that time. And I believe in 1957, there was correspondence between Homer Pickens, who was the Director of the Department at that time, and the U.S. Forest Service. The 1967 situation was not an original-type situation, something had been going on since 1932, discussions, at least.

Q. The idea of the implanting of elk on the Reservation was a matter of discussion since 1932, as far as you know?

A. Correct.

Q. Would you describe the Department of Game and Fish's position with reference to that matter, over these years?

A. The Department intended—

MR. FETTINGER: Your Honor, we appreciate the history lessons, but I fail to see the relevancy. In faith of the stipulation, the elk were brought in in the stipulated time period, and I fail to see the relevancy to this line of questioning.

THE COURT: Mr. Dunigan.

MR. DUNIGAN: I don't mean to dwell on this much longer at all. I just wanted the Court—

THE COURT: I think this is something Mr. Huey discussed earlier, if my recall is right, what the origin of the elk was, and the locality.

MR. DUNIGAN: Yes, sir. Well, maybe we could hasten things. We have prepared Exhibits C through O, which pertain to the history of the discussions concerning the implantation of these elk, and the objections of the Forest, National Forest Service, and the activities of the Department in support of the implantation, and we would propose to introduce those, hopefully, without having the witness identify each one, if Counsel would have no objection.

MR. FETTINGER: Your Honor, once again, our question is one of materiality of this lawsuit. Secondly, most of these items are objectionable on the basis of hearsay, and I fail to see where any of these letters would be kept in the regular course of business in the Department, with the exception of Exhibit M, which appears to be an importation permit. However, presuming that the Court would admit them without considering the fact that we are admitting to the truth of the facts alleged therein, if they're only for the purpose of saying that a dialogue went on about elk on the Mescalero Reservation, we'd be happy to stipulate to that fact, Your Honor.

MR. DUNIGAN: Your Honor, we would propose the exhibits and testimony would show not only that the discussions were carried on, but that the Department, indeed, assisted, cooperated with the Mescalero Apache Tribe in the location of the elk on the Reservation, and took an active part in accomplishing that objective, even though there was some opposition on the part of, at least, the National Forest Service.

THE COURT: Can you gentlemen enter into a stipulation to that effect?

MR. FETTINGER: Basically, yes, sir.

THE COURT: Fine. Why don't you do that. If there is any problem with it, we'll utilize the exhibits, if necessary.

MR. DUNIGAN: Are the exhibits to be admitted in case they are needed?

THE COURT: Yes.

MR. FETTINGER: Excuse me, sir, may I identify the exhibits that we're talking about? Is it Defendants' Exhibits C through O we're talking about?

MR. DUNIGAN: Yes, Your Honor.

THE COURT: Yes.

Q. (By Mr. Dunigan) To conclude this matter, Mr. Huey, would the implantation of the elk in '66 and '67 have been possible without the support and permission of the Department of Game and Fish in the State of New Mexico?

MR. FETTINGER: Your Honor, we'd object to the compound question, so far as the permit is concerned. It's a legal conclusion of the witness. In regard to the rest of the question, it's speculative, and calls for speculated answers on the part of the answering witness, without proper foundation being laid.

THE COURT: Fine. I'm going to let him answer.

A. At that time, there was an agreement between the Secretary of Interior, and the various states that had to do with the disposition of resident wildlife within the various states on Federal lands. In order for the elk to leave Wyoming, it was necessary that the State of Wyoming agree to removal of the elk from the lands of the National Park Service, and it was up to our Department to request that the State of Wyoming provide that agreement. We, of course, issued the importation permit.

Q. The permit of the State of New Mexico was essential to the whole business?

A. Yes.

Q. The stipulation to which reference has been made, Mr. Huey, specifies that the elk population in the Mescalero Reservation area is now 1,200, or approximately 1,200. In your professional judgment, is it possible that such a large herd of elk would remain within the Mescalero Reservation since the transplant of '66 and '67, at least, without physical constraint?

MR. FETTINGER: Your Honor, we'd suggest to the Court that this is within the scope of the stipulation, and refers to the fact that, upon occasion, the elk do leave the Reservation and return. I believe the stipulation covers this point, and it's only repetitive.

MR. DUNIGAN: May it please the Court, I don't believe the stipulation does cover this particular point, and that is why, short of agreement with the Plaintiff on that issue, we wanted some testimony to that effect.

THE COURT: Fine. He may answer.

Q. (By Mr. Dunigan) Do you recall the question?

A. I think so.

THE COURT: Do the elk migrate, Mr. Huey?

A. The elk are not restricted on the Reservation, and because they're not restricted, they would probably follow the patterns of their choice in their daily, weekly, and seasonal movement off of the Reservation and back onto the Reservation.

Q. (By Mr. Dunigan) What are the implications from a game and fish management conservation standpoint both as to the increasing size of the elk hered, and its free-ranging movement over this area?

A. Well, of course, the extent of the movement of the elk amplifies the effect that their presence has on the total ecosystem of that area.

Q. What is an ecosystem, and how would the elk in that area fit into that concept?

A. Okay, an ecosystem is a combination of biological units that interreact with each other. An ecosystem that included a herd of elk, would be a geographic area that contained the habitat components required by those elk on a year-to-year basis, food, cover, water, and, of course, that escosystem then would contain all of the other animals and plants that are not necessary to rely on each other, but interreacted with one another.

Q. In terms of the ecosystem concept, how would the other wildlife in this area, deer, the antelope, and the bear, and other wildlife fit into the ecosystem concept of management?

A. They would fit into it in respect to the effect that each individual of these groups or the groups as a whole impacted with the other groups. The deer and the elk are, in part competing for forage. I would imagine that there would be a very little relationship between the elk and the antelope, probably not too much relationship between the elk and deer and the bear except as they act as prey for the bear, the bear's predator-type position.

Q. What is that?

A. Almost all of the biological areas in the ecosystem relate to one another in one way or another. Some of these relations are pretty obscure, and others that are not obvious, might be very important.

Q. The Department, as I understand it, utilizes an ecosystem concept in its Wildlife Management Conservation Program.

A. I wouldn't say that we have perfected the ecosystem approach to management, but I would say that we're getting closer and closer each year.

Q. What are the implications of that system to the fish and wildlife on the Mescalero Apache Reservation?

A. The Reservation is a geographic area, not a biological area. There are no biological boundaries that are comparable to the geographic boundaries of the Reservation.

Q. Are you suggesting that because of the location and free-ranging habits of the wildlife in the area of the Mescalero Apache Reservation, that the physical boundaries of the Reservation, itself, do not comprise an ecosystem, or a management use?

A. That's correct.

Q. One other matter, with reference to the elk population, itself, Mr. Huey, I believe the Department has a regulation which limits or places a limitation on a single hunter, hunting elk for two consecutive years in the State of New Mexico, is that correct?

A. That's correct.

Q. Would you explain the reason for that limitation?

A. Well, the purpose of that regulation is to provide a more adequate distribution of hunter opportunity among the citizens, and the non-residents that choose to hunt in New Mexico. Since the hunting opportunities for elk are not great enough to accommodate everyone who wishes to hunt the area, and the year restrictions provide, as I say, better distribution of opportunity, without having to impose a more strict numerical limit on the number of persons who hunt each year.

Q. It's a matter of expanding the recreation opportunities made available?

A. Just distributing the opportunities more equally among the persons interested in hunting.

Q. Let me ask you this: How long has the Department of Game and Fish in the State of New Mexico been in business?

A. A long time. The first hunting regulations were in about 1895, territorial hunting regulations, and in effect, there has been a system of game and fish management activated in the State since that time.

Q. Apart from Indian lands in the State of New Mexico, which, as the stipulation provides, includes over 7.3 million acres, are there other private lands which the Department must be involved in in terms of fish and wildlife management?

A. Well, our program of fish and wildlife management is not developed with any consideration for status of ownership. There are a number of privately-owned areas in the State, where the question of entry has a bearing on the management practice, proprietary rights of the owner to identify control methods and frequency with which persons would enter that land for the purposes of hunting. But it's our, as I say, our plan of management of wildlife in the State, is on this ecosystem basis, and not with consideration of geographic boundaries.

Q. But your management concept, then, has to take into account activity everywhere, regardless of the status of the land?

A. That's correct, correct.

Q. What is the interest of the State of New Mexico, or the Department, in enforcing its hunting and fishing laws, with respect to activities on these private lands, including Indian lands?

A. I think—

MR. FETTINGER: Your Honor, I hate to interrupt, but this area was covered rather thoroughly in the stipulation, and we're repeating areas that we have covered once in the

stipulation. The purpose of the stipulation is to save the Court's time, and save the necessity of bringing witnesses before this Court.

MR. DUNIGAN: I understand that. I don't intend to take much more time with this witness, but there were certain items which we were unable to meet agreement on, with reference to the stipulation, and I thought it advisable to amplify in some small measure on the provisions in the stipulation with regard to the pattern of fish and wildlife management, and the needs and interests of the State in making operational its programs and policies.

THE COURT: Fine. Well, it's my understanding that the Department exercises control over all of the areas in the State, except on the Reservation, and on these privately-owned tracts of land that have their own management, and furnish their own game, maintain a fence. Probably not in the National Park areas, but certainly in the proving grounds, Elephant Butte Reservation, Navajo Reservation, all of the rest of them, with very few exceptions. This is my understanding of the situation. I may be wrong about it, but it's my recollection of it.

MR. DUNIGAN: I don't believe you are wrong.

Q. (By Mr. Dunigan) Is that your understanding, Mr. Huey?

A. That we take a position that we have jurisdiction over the management of wildlife in the whole State of New Mexico, that's the position of our Department.

Q. And that you do, in fact, exercise it with very few exceptions?

A. Yes, that's correct.

THE COURT: They even exercise management over the range of the Mesilla Valley, that are owned by the Elephant Butte District.

Q. (By Mr. Dunigan) Would you describe briefly, Mr. Huey, the potential effects, as you see it, of an inability on the

part of the Department to control or coordinate hunting and fishing activities within the State, on a State-wide basis?

MR. FETTINGER: Your Honor, we'd object to the question, requiring speculation on the part of the witness, unless there is a proper foundation laid with reference to how it interferes with the State's specific program.

THE COURT: Fine, he may respond.

A. If we can't continue to develop annual regulations and management plans that involve the whole State, then, we would have to attempt to estimate the effect that excluding portions of the State might have on the total management plan. In the absence of any research that relates itself to that question, it would be practically impossible at this time. It would also be difficult or impossible to maintain the contact with the hunters and fisherman who participate in the sports State-wide, for reports of their activities, which we use to define trends and hunter activity, and harvest, and the impact of this activity on the total resource.

Q. (By Mr. Dunigan) The licensing requirement for hunters and fisherman within New Mexico is a means of keeping track of who's doing what, in terms of hunting and fishing?

A. That's correct, in addition, of course, to the revenue that's derived from the sale of those licenses.

Q. Is that revenue utilized in, and needed for the carrying out of the Fish and Wildlife Management Program in the State of New Mexico?

A. That's correct.

Q. What other scientific methods are used by the Department in its management conservation program?

A. You know, if we began to describe all of the different techniques that we used, we would take a long time. I would say that the techniques and procedures that our Department uses in the management of fish and wildlife in the State, are those that have been either developed by our Department, or

developed by other Departments, and adopted as standard procedure for the management of fish and wildlife. They're becoming more and more complicated each year, there is more and more technology involved, and it's becoming, each year, much closer to a science than an art, than it used to be.

Q. Would you describe just briefly some of the research activities that are carried on by the Department, and what implications they have, if any, on the State-wide basis?

MR. FETTINGER: Your Honor, we fail to see the relevancy of this item, especially in light of this former Court's service as the Governor of the State, and I realize the plans are carried out by the Department, and they have so stated. I'm sure they do carry on research. The relevancy to the particular State seems so remote, it's beyond comprehension.

MR. DUNIGAN: Your Honor, the purpose of this testimony is to provide the Court with an adequate picture of the activities of the State, in reference to game and fish management, and the implications it has for activities on Indian land, and the importance of that activity to the Department's overall program, and also, to point out that the Department's program has a beneficial effect on all areas of the State, whether or not its jurisdiction there is recognized. And that's the purpose of this testimony. I don't intend, and don't want to belabor that point. If that's clear and understood and agreeable to everybody, then, I don't need to pursue this.

THE COURT: I think probably it would take about a day to go into all of them.

MR. DUNIGAN: I'm sorry, Your Honor.

THE COURT: I say, I think it would take a day to go into all of them, Mr. Dunigan.

Q. (By Mr. Dunigan) Mr. Huey, would you evaluate the Mescalero Apache Indians' Fish and Wildlife Management Program?

MR. FETTINGER: Your Honor, We're going to object to that. The stipulation covers the fact that the actions of the Tribe have had no adverse impact on fish and wildlife outside

of the Reservation, and it would be speculation on the part of this witness, because he's previously testified to a lack of information about what went on within the Reservation.

MR. DUNIGAN: Your Honor, I recognize the stipulation, which says that in the judgment of the Department, the ordinances of the Tribe presently maintain the wildlife at a management level, and that there have been no adverse effects on the Reservation. My question in this regard simply goes to the extent this witness is familiar with the system of management on the Reservation, and the other activities there, how they would be evaluated on a professional basis.

THE COURT: Fine. He may answer, if he can.

A. I would say that the management program, the Wildlife Management Program on the Reservation is not a program that the Department would use on lands over which it had exclusive control.

MR. FETTINGER: Objection, Your Honor, that's not responsive to the question.

Q. (By Mr. Dunigan) Could you elaborate a little more on that, in what specifics would it be inadequate, in your judgment?

A. With respect to the relationship that exists between wildlife and domestic livestock.

Q. I see. What are the specifics of that particular problem, as you see it?

A. The adverse competition between domestic livestock and wildlife.

Q. You've speaking of the competition between the wildlife and the livestock that reside on the Reservation?

A. Correct.

Q. Historically, Mr. Huey, has it been the policy and practice of the Department to accommodate the Mescalero Apache Tribe and other Indian groups in the State, with reference to their preference for seasons and bag limits and the like?

MR. FETTINGER: Your Honor, we'd object to the question as being compound, and in that regard, it applies to the other Indians in the State. It's irrelevant in regard to the Mescalero Apache Tribes, there is no appropriate foundation to demonstrate that the Tribe has requested such changes in seasons, and I believe the stipulation provides that the changes were prompted by two things; occasionally, the request of the Tribe, and also, at the Commission's request, on its own initiative.

MR. DUNIGAN: Your Honor, my purpose in this inquiry is to inform the Court that whether or not any particular request had been made, although I'm certainly getting into the specifics of that, the posture of our Department with reference to the diverse Indian groups within the State of New Mexico.

Let me, if I may, Your Honor, ask Mr. Huey whether he knows of any requests, at any time, on the part of the Mescalero Apache, for a preference with respect to hunting seasons or bag limits or the like.

A. Specific requests of the Mescalero for—

Q. (By. Mr. Dunigan) Has there ever been one, to your knowledge? Has the Mescalero Tribe ever expressed to the Department any preference with regard to hunting seasons or bag limits or the like, and sought to be, and asked the Department to cooperative with them in that regard?

A. There was, for quite a time, a general atmosphere of working together on these things. The only specific that I can remember is an occasion when the Commission changed the regulation, extended the deer season to accommodate a request of the Tribe.

MR. DUNIGAN: I don't believe I have any further questions, Your Honor.

THE COURT: Mr. Fettinger.

CROSS-EXAMINATION

BY MR. FETTINGER:

Q. Mr. Huey, I believe you stated, back in 1967, that there was some agreement with the Secretary of the Interior, which required cooperation of the State. My understanding of your testimony was to the effect that the Wyoming cooperation was required in order to remove the elk from that State, is that correct?

A. That's correct. If Wyoming hadn't agreed to the release of the elk, under that agreement, the Secretary of the Interior, the Park Service wouldn't have been able to remove the elk.

Q. And you believe the State of New Mexico was material in getting the State of Wyoming to act in that particular instance?

A. That's correct.

Q. B.I.A. didn't have anything to do with it?

A. I don't know that B.I.A. had any dialogue with the State of Wyoming. I do know that our Department had dialogue with the State of Wyoming.

Q. Do you know for a fact that the B.I.A. did not have dialogue with the State of Wyoming?

A. No.

Q. Do you know for a fact that the Mescalero Apache Tribe did not have dialogue with the State of Wyoming?

A. No. I do not.

Q. Then, the State of New Mexico was one of the participants in that particular episode, is that correct?

A. I would suggest that the position of the State of New Mexico, in a discussion of this kind, would be an important party to that discussion.

Q. That wouldn't be influenced by your present position, would it?

A. I'll let you know how the State operates.

Q. A moment ago you told us that the elk range on and off the Reservation, the Mescalero Reservation, in this case. Do you have any knowledge that would lead you to believe that all of the elk leave the Reservation?

A. No.

Q. What are the factors that determine whether or not the elk will leave a particular area, whether or not it's an Indian Reservation?

A. It may be a matter of choice and habit.

Q. That choice and habit include eating?

A. Yes.

Q. Would the presence of adequate food influence an elk to stay in its present location?

A. Not necessarily.

Q. Would it be one factor the animal would consider?

A. It would be one, that is correct. Correct.

Q. Would it be an important factor?

A. That's correct.

Q. Would it, the presence of water, be an important factor in the consideration of whether or not it would move, in fact, to another location?

A. It would be an important factor.

Q. Would the elevation of the Territory be an important factor as to whether or not the animal would seek another location for its home?

A. The elevation would contribute to seasonal movement.

Q. Do you remember, are there adequate changes in elevation available to suit the habits of elk and their seasonal movement within the confines of the Mescalero Indian Reservation?

A. I would certainly agree, if the Mescalero Reservation were completely enclosed, that a given number of elk could exist there, forever.

Q. My question was, in fact, are there adequate changes in elevation on the Mescalero Indian Reservation to accommodate elk in both the summer and winter months, for that latitude?

A. Only as far as the choice of the individual animals causing those needs to be made.

Q. Within your experience, would you anticipate that the elk could survive easily within the confines of the Mescalero Reservation during both the summer and winter months?

A. If they chose to do so.

Q. If they chose to do so, then the area is capable of supporting them?

A. Correct.

Q. Are you aware of the size of the elk herd when it was brought in in 1967?

A. Yes.

Q. Do you have any knowledge regarding the present size of the elk herd on the Mescalero Reservation?

A. I don't have any specific knowledge of the size of the elk herd, no.

Q. Presume for the moment that it's 1,200. After a period of 11 years, would that indicate reasonably good game management in regard to the elk?

A. Well, I wouldn't agree that anything other than protection would be necessary to cause an increase of that kind. I wouldn't agree that any management at all would be necessary.

Q. One of the aims of your Department, in issuing a limited number of licenses, is the protection of game animals in the State of New Mexico?

A. Of course, the reason for issuing licenses is to provide consumptive recreation benefits. Limiting the licenses would be protective, yes.

Q. Limiting licenses by the State of New Mexico is an effort to protect the number of game animals within the State of New Mexico and control the numbers, is that correct?

A. One of the methods.

Q. Would the same rule apply to the Mescalero Reservation?

A. Yes.

Q. You mentioned before that you have reason to believe certain of the elk may have left the Reservation. May I ask if you know of any adverse impact upon the game program of the State of New Mexico, by virtue of the elk leaving the Mescalero Indian Reservation?

A. Not to this point, no, I think there is a potential, though, for a problem.

Q. Would there also be a potential for problems ranging for the same circumstances across the common State boundary with the State of Arizona?

A. Well, there is one situation where problems of that kind might exist between New Mexico and Arizona.

Q. How about Colorado?

A. Same.

Q. The same principle applies, doesn't it, if they were to go on a program to exterminate their game, it would have an impact on our game animals in New Mexico?

A. That's correct.

Q. If they went on a program for no game hunting, that would have an impact on our animals, wouldn't it?

A. I don't think that would be an adverse impact.

Q. But it would have an impact?

A. Right.

Q. It would have an influence on your management decision in influencing the herds in New Mexico?

A. That's correct.

Q. Can you think of any specific requests of the Mescalero Apache Tribe, addressed to the Fish and Game Department, with regard to the Management on the Mescalero Reservation, in your field?

A. As I said before, I can remember that one case where the Tribe did ask that the seasons be changed. There is correspondence in the files that we've reviewed just recently, having to do with previous plans to plant elk on the Reservation, which were requests made for assistance. Requests were made for assistance in about 1969, for the Department to conduct a wildlife enforcement training course on the Reservation.

Q. For whom?

A. I wouldn't say it was a rare situation.

Q. Not quite rare? Not quite rare?

A. It was not rare.

Q. It happened a couple of times?

A. It happened more than a couple of times, that, I think, happened a number of times.

Q. That training program you've talking about was for conservation officers of the Mescalero Apache Tribe?

A. Yes.

Q. And that program was successfully conducted by the State of New Mexico?

A. Yes.

Q. Members of the Tribe attended?

A. Yes.

Q. To your knowledge, those members went back to serve as conservation officers within the confines of the Mescalero Indian Reservation?

A. I don't have any idea how long they might have served, but I would assume that they served for some time.

Q. Are you familiar with the 3,200-acre game preserves in the State of New Mexico?

A. Yes.

Q. What do you call those?

A. Class "A" Parks.

Q. Does that have any impact on your game management?

A. No.

Q. It doesn't? Are those fenced areas?

A. Yes.

Q. Are they fencing out some animals as well as fencing in some animals?

A. Yes.

Q. Limit the area where an animal can feed?

A. Well, they limit the area in which an animal might feed. They don't necessarily limit the ability of the animal to feed.

Q. But they do limit the animals, on each side of the fence, and the areas they can roam and feed and find water?

A. Sure.

Q. May I ask you what your management of a specially big game species, based upon a herd concept, means?

A. Well, that's an attempt to narrow the parameters that you'd work in when you're developing hunting regulations, season dates, bag limits, habitat improvements, because the demand of the different herds would probably be different. In other words, it would provide a higher level of sophisticated management, when you break it down on the herd basis.

Q. What's the difference between a herd concept and your ecosystem?

A. The herd concept would be comparable to the ecosystem concept, except that it wouldn't take into consideration the other species that are interreacting with the species that you're talking about managing.

Q. When did your Department launch itself on the ecosystem concept, if I may ask?

A. Well, it's not a function of launching, like you just get up in the morning and go out and talk ecosystem, it's just another area of sophistication. The comprehensive plan that our Department has developed over the past three years gives heavy emphasis to the ecosystem concept, to permit us to broaden our consideration of wildlife management to include the non-game, as well as the game species.

Q. And I note with interest, when we were here before, last August, you did not mention the ecosystem concept in your testimony at any time before the Court. Was it in effect at that time?

A. I only responded to questions as best as I could.

Q. Do you recall using the language, "Our management of the specially big game species is based upon a herd concept"?

A. You bet.

Q. And what's the herd concept you talked about before?

A. And it's still in effect.

Q. By the way, you were talking about elk leaving the Reservation. Could that, in any way, damage the management program of the State of New Mexico?

A. Well, it would depend on how many of them left.

Q. Well, 50 or 60, this might have some impact? What would be the impact of 50 elk leaving the Reservation, staying in the mountains, in territories otherwise frequented by hunters, and within your conventional jurisdiction?

A. Okay, we can identify two effects, and let's not limit it to 50, because, you know, as a matter of reality, we're not talking about 50, we're talking about the possibility of the herd continuing to grow so that there would be competition, adverse competition between the deer and elk, or the elk and some other species. The other impact, of course, would be to provide some recreation off of the Reservation.

Q. And the recreation that would be provided off of the Reservation would be hunting to hunters by the State of New Mexico for off-Reservation hunting, is that correct?

A. That's correct.

Q. And that would be done without expense to the State of New Mexico, is that correct?

A. Well, it would depend upon the degree upon which the competition factor between the elk and the deer became a problem. If the competition between the deer and the elk became significant enough that the deer herd was reduced, then the units of hunter opportunity would be reduced, because, quite obviously, an area can accommodate enough deer to provide more of a hunting opportunity, more hunter days, than that same unit could produce with an elk herd.

Q. Are we endangering saturating Southeastern New Mexico with deer at this time?

A. Not today or tomorrow, but I would say there is a danger of an excessive number of elk developing in that area.

Q. Remote danger?

A. Well, I can say it's remote in that the Department's management activities will be directed at attempting to prevent that from happening.

Q. Your activities are also aimed at preventing extinction of the animal in that area, is that correct?

A. That's correct.

Q. The Mescalero Indian Reservation has managed its game over the last eight or ten years. I believe our stipulation

recites that. You know of no adverse impact upon the wildlife off of the Reservation in that area, is that a fair statement?

A. That's correct.

Q. If the Mescalero Indian Reservation were to continue to manage its game in a reasonable way, as it has done in the past, would you anticipate any significant impact on the surrounding areas in regard to the items within your jurisdiction and control?

A. Well, you know, I don't—I think we're assuming, when we say "in a reasonable way," I don't know what a reasonable way might be.

Q. The way they've done it in the past eight years.

A. If they do it the way they've done it in the past eight years, it might result in some problems.

Q. Let's talk about this business of limiting the elk permits to every other year. I understand your purpose there is to permit a greater opportunity for hunters to hunt elk in New Mexico, is that correct?

A. That's correct.

Q. And it doesn't have anything to do with game management, does it?

A. No, it does not.

Q. It's a matter of public relations on the part of your Department?

A. No, it's not a matter of public relations, it's a matter of statutory responsibility.

Q. To satisfy the greatest number of hunters, then?

A. Yes.

Q. Are there any restrictions on hunting antelopes in New Mexico?

A. Yes.

Q. What are they?

A. They may be only hunted during open seasons, namely, only hunted, you know, there are specified methods and manners of taking their bag limits set each year.

Q. Any limitation similar to the one on elk, that you can only have one every couple of years?

A. That's correct.

Q. Is there any area that conflicts with the Mescalero Apache Tribe?

A. That's correct. Well, if the Mescalero Apache Reservation, or Mescalero Apache regulations don't include that, they'd be in conflict with our regulations.

Q. Yours contain those, to the best of your knowledge, and theirs do not, and they presently conflict, is that correct?

A. Yes.

Q. Can you authorize a hunter to go into a restricted military area?

A. Yes.

Q. What if that area is closed to the public?

A. Quite frequently, in deer hunting season, often the White Sands, and the San Andres, Oregons, the Magregor Range, the seasons, the entry of deer hunters is permitted when public entry is not permitted.

Q. But that's within the control of the military, isn't it,—

A. That's correct.

Q. —not within the control of your Department?

A. No, that's right.

Q. Are there other areas over which you do have the right to authorize ingress or egress?

A. We don't have the right to authorize that over any privately-owned lands.

Q. But in effect, you can open them up to hunting, is that correct?

A. That's correct.

Q. But you can't control the access of a hunter to White Sands Missile Range, for example, that's within the control of the military, while you may have the right to—

A. A function of the agreement between the military and the Game and Fish Department.

Q. And that's an agreement that could be changed at some particular time, perhaps, by the military, is that correct?

A. Well, those agreements are developed on an annual basis.

Q. Then, the military could change this?

A. But the military, the Department of Defense's Regulations, and the Sikes Act, a Federal Act that provides guidelines for the recreational use of military areas and others.

Q. They are like your Reservation Regulations, they can be changed, is that correct?

A. Well, of course, anything, I suppose, can be changed.

Q. In fact, you do not have control over the access to that area, the military does?

A. As a matter of practice, I think the access is more of function of the language in the Sikes Act, and these cooperative agreements, which we've developed with the military, and, you know, to say that they could be changed, is certainly true, but we're talking about practice.

Q. Practice is history?

A. That's right, it's history, and it's also pattern for the future.

Q. In a sense that history repeats itself?

A. Yes.

Q. Are you aware of how much land within Otero County is owned by some Governmental Agency?

A. No, I don't.

Q. Are you aware that it's substantial?

A. It's substantial.

Q. So, a substantial part of Otero County is not within your control for purposes of controlling access to and from the area, for purposes of hunting?

A. Well, wait just a minute, this is another subject that has been discussed. There has been quite a bit of dailogue with regard to areas of public lands being opened or closed to hunters, and I think it's pretty generally agreed that hunters cannot be excluded from other areas unless all other persons are excluded.

Q. Are all other persons excluded from other portions of the White Sands Missile Range, to your knowledge?

A. Yes.

Q. Therefore, hunters could be excluded from substantial portions of the White Sands Missile Range, is that correct, under your interpretation?

A. Well, I'll repeat myself.

Q. Excuse me, if you will just answer my question, please.

A. Could you repeat the question?

Q. You just gave me a theory, I'm applying it to the fact that if all persons are excluded from substantial portions for the White Sands Missile Range, then, hunters could be excluded from substantial portions of the White Sands Missile Range, under the standards you just gave me a moment ago?

A. Yes.

Q. Have you ever made inquiry of the Mescalero Apache Tribe regarding statistics covering hunting and fishing on the Reservation?

A. I have not.

Q. Would you consider the gathering of such statistics important to your program, as Director of the State Program?

A. Yes.

Q. No request has ever been made of the Tribe, or the B.I.A., for any such figures, though?

A. I'm not sure.

Q. Well, to your knowledge, have there ever been any such inquiries?

A. No.

Q. Have you ever made such inquiries of Fish and Wildlife?

A. No. There has been discussion between our Department and the representative of the United States Fish and Wildlife Service, as well as representatives of the Bureau of Indian Affairs, that have to do with the hunting activities, the number of hunters, the take by Indian hunters, and, you know, a general discussion of wildlife conditions on the Reservation, and annual harvest on the Reservation. As far as any formal request of the Tribe or the B.I.A., or the Fish and Wildlife Service for a written document of that, I don't think it's ever been done. I think that the level of hunting on the Reservation, as far as we know and have determined from this dialogue, that's existed between the representatives of the Department of Game and Fish, and the Fish and Wildlife Service, and the B.I.A., and the Tribe, have given us assurances that, you know, nothing was being done there that required any drastic change.

Q. You know of no reason to be concerned?

A. Well, of course, you're always concerned.

Q. Besides your normal concern for the general game population of the State of New Mexico, and the hunters, on the other hand, you know of no specific reason why you should be concerned about the hunting programs or the fishing programs on the Mescalero Reservation?

A. Not to this time.

Q. And in spite of the fact that the collection of statistics from hunters is a fairly expensive program of your Department, no request has been made of the B.I.A., or the Bureau of Sport Fisheries, or the Mescalero Apache Tribe, regarding the success

of Indian hunters, or other hunters on the Mescalero Indian Reservation?

A. Well, of course, the non-Indian hunters on the Reservation are covered by our surveys.

Q. Then, limit my question to the Indian hunters on the Reservation.

A. As I say, we considered it to be more or less a constant, and the numbers taken are insignificant enough to not be cause for, you know, the need for any change.

Q. Well, the numbers on the whole?

A. The adjustment.

Q. The numbers of all hunting on the Reservation is rather insignificant, isn't it?

A. That's correct, at this time.

Q. At this time, you maintain contact with your hunters by sending out questionnaries. To what percentage do you send questionnaries?

A. Ten percent.

Q. What percent respond?

A. Well, ten percent of the big game hunters, and about, well, some of the bird hunters, the percentage is higher than that. And the elk hunters, some of the elk-hunter surveys are 75 percent or greater. The antelope-hunter surveys are 100 percent.

Q. I'm sorry, go ahead.

A. The spans from those, I'd say, varies around 50 percent.

Q. You get back about 50 percent of the questionnaires you send out?

A. That's correct.

Q. You mentioned a number of research programs that were conducted by your Department. Were any of those

research programs conducted specifically for the Mescalero Indian Reservation?

A. No, I wouldn't say that any of the research projects were conducted for any specific geographic locality in the State. The purpose of the research project is species oriented, rather than oriented to geographic or individual user groups.

Q. But, in fact, none were prepared specifically for the Mescalero Indian Reservation?

A. That's correct.

Q. Were any specifically prepared for the B.I.A. in connection with the Mescalero Indian Reservation?

A. No.

Q. You referred to the adverse competition between wildlife and livestock for feed. Does that competition exist on the Mescalero Indian Reservation, to your knowledge?

A. Yes.

Q. Are you aware the Tribe runs a herd of cattle, and they have 6,000, 7,000 head on the Reservation?

A. I'm not aware of the exact number each year, but I was aware that a significant number of cattle are present on the Reservation every year.

Q. Are you aware that the Mescalero Apache Tribe sells hunting permits for elk, for example?

A. Yes.

Q. Are you aware that they charge rather substantial fees for those elk permits?

A. Yes.

Q. In your experience, if the hunting were not better within the area for which the person buying the permit—

A. Well, better than what?

Q. Better than anyplace else that's immediately available to him, the surrounding portion of the State of New Mexico.

A. Well, I know that hunters are willing to pay a substantial fee for elk hunting, and the quality of hunting that exists in the areas upon which they hunt, varies. I'm sure that if a person is paying as much as $2,000 to $3,000 for the privilege to hunt elk, that he's going to expect to have a pretty high level of success.

Q. To your knowledge, do the hunters hunting elk on the Mescalero Reservation have a high level of success?

A. High level of success.

Q. Is that a product of poor game management?

A. That's a product of a low number of hunters in comparison to the number of elk present.

Q. Do you know of a comparable success rate in any place in the vicinity of the Mescalero Reservation?

A. Here again, when we're talking about vicinity of the success ratio in the Vermejo Park, or the Jicarilla Reservation?

Q. Let's say 25 miles from the Mescalero Reservation.

A. No.

Q. 50 miles from the Reservation?

A. No.

Q. 100 miles away from the Reservation?

A. Bingo.

Q. That's where you get the Jicarilla?

A. No, that's where you get the Black Range.

Q. That's more or less private hunting?

A. That's correct.

Q. Do the Mescalero Reservations compare favorably with a private hunting preserve?

A. That's correct.

Q. Does that private hunting preserve have good game management?

A. No.

Q. Does it accomplish its purpose?

A. I don't know what their purposes are.

Q. To provide hunting for hunters, apparently, with a high success ratio.

A. Well, if that purpose is the major purpose, yes, it does occur. But if it's, you know, if they have a long-term objective of continuing to provide that kind of hunting, they're in trouble.

Q. You have no reason to believe that problem exists on the Reservations, from your observations of the past performance, do you?

A. Not at this time.

Q. From your observation of past performance?

A. Not at this time.

Q. Okay. Are you familiar with the fact that your attorney refused to enter into a stipulation regarding your familiarity with the game management on the Reservation, prior, in this lawsuit?

A. No.

Q. Where did you get your information regarding the game management program on the Mescalero Reservation?

A. Well, you know, as I know, I've been associated with the Department for quite a number of years, and for the past 15 years, very closely associated with the total game management program of the State. And in that position, I attempted, and I think I was successful, in keeping myself familiar with the conditions that exist in all parts of the State.

Q. Do you have any specific knowledge of the numbers of hunters, and the number of animals taken on the Mescalero Indian Reservation?

A. Not specific numbers, no.

THE COURT: How much more do you have, Mr. Fettinger?

MR. FETTINGER: One more question, sir.

Q. (By Mr. Fettinger) Have you ever had occasion to enforce your statutes regarding an Indian, who is not a resident on a particular Reservation, hunting on that Reservation?

A. No. Well, at least not—you know, not in—

Q. Not in the memory of man?

A. Not in the memory of this man.

MR. FETTINGER: Thank you, sir. No further questions, Your Honor.

THE COURT: Mr. Dunigan.

REDIRECT EXAMINATION

BY MR. DUNIGAN:

Q. Mr. Secretary, with reference to the areas over which you can authorize access, whether military or otherwise, the Department does license those who are admitted, and given access to those areas, does it not?

A. That's correct.

Q. So, you are aware of the activities that do take place on those lands?

A. That's correct.

Q. Now, with reference to research projects, you've indicated that your research normally doesn't—is not directed to benefit a particular area, necessarily. Let me ask you if any of the research projects that are carried on by the Department, do have a beneficial effect, at least, indirectly, throughout the State of New Mexico?

A. It's possible with any research project to expand the results of that project to other areas that are comparable, other

areas of habitat that are comparable, when we're talking about research projects that have to do with wildlife species.

Q. So, although research projects may not have been undertaken on the Reservation, or specifically with reference to the Reservation of the Mescalero Apache, nevertheless, that area may very likely benefit from the research that is conducted by the Department?

A. That's correct.

MR. DUNIGAN: Your Honor, I don't have any further questions. . . .

IN THE

United States District Court

FOR THE DISTRICT OF NEW MEXICO

No. 77-395-M Civil

MESCALERO APACHE TRIBE,
Plaintiff,

v.

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of the New
Mexico Department of Game
and Fish, or his Successors in Office,
Defendants.

ADDENDUM
(filed August 4, 1978)

Having cited in the Memorandum Opinion entered herein the case of *United States v. Finch,* 548 F.2d 822 (9th Cir. 1977), it is noted that the judgment in *Finch* was vacated on other grounds, 433 U.S. 676 (1977). The comment quoted and the rationale of that opinion are nonetheless pertinent to the case presently decided.

/s/

UNITED STATES DISTRICT JUDGE

IN THE

Supreme Court of the United States

No. 80-778

NEW MEXICO, *et al.*,

Petitioners,

v.

MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Tenth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the Tenth Circuit for further consideration in light of *Montana* v. *United States*, 450 U.S. ___ (1981).

IT IS FURTHER ORDERED that the petitioners, New Mexico, *et al.*, recover from Mescalero Apache Tribe Two Hundred Dollars ($200.00) for their costs herein expended.

April 6, 1981

Clerk's costs: $200.00

Office - Supreme Court, U.S.
FILED
OCT 14 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-331

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEW MEXICO AND HAROLD F. OLSON INDIVIDUALLY AND AS DIRECTOR, NEW MEXICO DEPARTMENT OF GAME AND FISH,
PETITIONERS,

vs.

THE MESCALERO APACHE TRIBE,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES TENTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit complied with this Court's Order to reconsider the case in light of Montana v. United States, 450 U.S. 544 (1982).

2. Whether granting exclusive jurisdiction to the Tribe's hunting and fishing program here is in any way materially inconsistent with the cases ruled on in this or the other Federal Courts.

3. Whether under the facts the State's interest in sound game and fish management is infringed upon by the decisions below in this particular case.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON, INDIVIDUALLY AND AS DIRECTOR, NEW MEXICO DEPARTMENT OF GAME AND FISH,
Petitioners,

v.

THE MESCALERO APACHE TRIBE
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The relevant opinions of the Tenth Circuit (Pet. App) are reported at 630 F.2d 724 (1978), and 677 F.2d 55 (1982).

JURISDICTION

The judgement of the Court of Appeals was entered on April 26, 1982. The Petition for a Writ of Certiorari was filed on August 25, 1982. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND TREATY PROVISIONS INVOLVED

The pertinent statutes and treaty provisions are set out in the Petitioner's Appendix at 54a et seq.

STATEMENT

Petitioners (hereinafter State) again neglect to inform the Court that this case was presented to the District Court of New Mexico largely on stipulated facts. This Stipulation is attached hereto as an appendix. The corresponding page numbers in the record are pages 117-137 of Vol. I.

The Statement of the Case in the Petition is incomplete and misleading. The Petitioner implies that the Tribe's hunting and fishing program is carried on entirely in connection with the Inn of the Mountain Gods resort complex (Pet. p. 3). Actually, the Tribe's hunting and fishing program existed long before the opening of the Inn in 1975. The only hunting and fishing related to the Inn are the package hunts and fishing at the Inn's lake. The majority of big game hunting is not related to the Inn, and the lake at the Inn is only one of several man-made lakes stocked for fishing on the Reservation.

While it is true that the State has in the past stocked streams on the Reservation, essentially all of this occurred prior to 1970. Between 1970 and 1976, the State stocked only a part of one stream and since 1976 has not stocked any part of any stream on the Reservation. None of the several man-made lakes has ever been stocked by the State. All waters within the Reservation are stocked

with fish from the National Fish Hatchery at Mescalero (Appendix at 12a).

The fish hatchery is operated pursuant to an agreement between the Tribe and the Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior. Federal personnel not only provide fish for the Reservation waters, but technical assistance as well. The agreement further provides that the Tribe will establish regulations for the conservation of fish resources, consistent, insofar as possible, with State regulation (Appendix at 12a). A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation based upon periodic surveys of all Mescalero Reservation fishing waters (Appendix at 13a).

The Petitioner also implies that a lone Bureau of Indian Affairs Range Conservationist is responsible for all of

the deer, elk, antelope and bear population estimates upon which recommendations for seasons and bag limits are made to the Tribal Council. Actually, the Tribe employs seven full-time conservation officers who assist the range conservationist. All of these tribal personnel have received training in game and fish management and law enforcement (Appendix at 11a). In addition to formal training, these officers have substantial on-the-job experience. Id. While the State has participated in this training at the request of the Tribe, these requests have been limited (Appendix at 15a).

The State receives federal funds to support the administration of hunting and fishing in the state based on the number of state licenses sold and the number of acres of land in the state. The area of the Mescalero Apache Reservation is taken into account for this purpose, as were the number of state-licensed hunters and fishermen on the Reservation during the time such licenses were required by the Tribe (Appendix at 16a, 17a). However,

within the boundaries of the Mescalero Apache Reservation, the State of New Mexico, in the last twelve years, (this statement made in 1982) has not selected or improved any land or water areas as adaptable for wildlife feeding, resting or breeding places. The State has not adopted nor formulated any plans for restocking lakes and streams with fish, has not conducted research into problems of fish management or administration of fish resources, and has undertaken no wildlife restoration projects (Pet. 40a-41a).

The only reference in the Petition to conflict between the Tribe and the State in respect to fish and game management is that one tribal ordinance specifically provides that no State license is required. There are many other areas of conflict. Tribal seasons and bag limits for both hunting and fishing rarely, if ever, coincide with those of the State causing annual conflict between the Tribe and the State (Pet. 41a). Indeed, at the initiation of this lawsuit the Tribe was forced

to obtain a temporary restraining order to prevent the State from arresting non-Indian hunters for hunting on the Reservation during one of the Tribe's big game seasons which began prior to the State's season. State law prohibits a person from hunting elk or antelope for two consecutive years, while tribal law does not (Appendix at 25a). In the past, this conflict has led to the arrest of non-Indian hunters on the Reservation (Appendix at 32a). Also, state law requires juvenile hunters to obtain a Hunter Safety Certificate, while there is no such tribal requirement. Id at 31a.

Finally, the State neglects to mention that the Stipulation contains a provision that "...the [New Mexico] Department [of Game and Fish] considers that the hunting and fishing ordinance of the Tribe presently maintain the fish and wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation". (Appendix at 33a,34a).

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION FAITHFULLY ADHERED TO THIS COURT'S INSTRUCTION TO CONSIDER THE CASE IN LIGHT OF MONTANA v. UNITED STATES.

On remand the Tenth Circuit made a valiant and effective effort to assure that Montana v. United States, 450 U.S. 544 (1981), was followed, and that this and the Montana case were compatible. The Order of April 6, 1981, issued by this Court in granting review to the State, required the Tenth Circuit to compare its previous decision with the rules enunciated in Montana. This has been done. There is nothing in Montana which expressly, or by implication, contemplates a result or approach different from what the Tenth Circuit ordered on remand.

The issues which were placed before this Court in Montana were relatively simple. The Crow Tribe had sought to prevent any non-member from hunting or

fishing on any lands situated within the exterior boundaries of their Reservation. The Tribe further arrogated unto itself the power to prohibit hunting and fishing on substantial non-Indian lands within the exterior boundaries of the Reservation. The State of Montana, however, maintained that it had the authority to regulate hunting and fishing on these substantial fee lands which were privately held. The State of Montana prevailed.

The scope of the issue to be decided in Montana was clearly defined:

> "Though the parties in this case have raised broad questions about the power of the Tribe to regulate hunting and fishing by non-Indians on the Reservation, the regulatory issue before us is a narrow one... What remains is the question of the power of the Tribe to regulate non-Indian fishing and hunting on Reservation land owned in fee by non-members of the Tribe" (emphasis added) 450 U.S. at 557.

This Court declared the Crows had no such power. All subsequent discussion was directed toward, and limited to, this question.

The instant case is entirely different. A detailed list of the facts as found by the District Court is set forth under point II below. However, the legal elements comprising the controversy at hand can be simply laid out. The conflict here concerns whether the State can lawfully seek to regulate the hunting and fishing activities of non-Indians while physically within and actually on Tribal Reservation land, when the Reservation Tribe has a comprehensive, properly created, sanctioned, and executed game and fish program. Under the facts as presented, the Tenth Circuit initially concluded the State had no such power, and on remand again declared that the State was without such power. The decisions of the Tenth Circuit are consistent, harmonious, and commensurate with the standards enunciated in Montana. This decision is sound.

With respect to the comparisons made between this case and the Merrion decision (Merrion v. Jicarilla Apache Tribe, 71 L.Ed 2d 21 (1982)), the Tenth Circuit was merely assuring itself that there were no latent, unforeseen circumscriptions to the doctrine of Tribal sovereignty. Had Merrion signaled such a diminution of the doctrine, then that would have prompted further review of Montana. This was a deferential precaution to be certain the Order of this Court was dutifully carried out. The Tenth Circuit faithfully performed its duty on remand.

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH THE DECISION OF THIS COURT OR WITH ANY OF THE CIRCUIT COURTS.

A. The Facts.

Under the standards created by this Court only one conclusion is possible under the facts of this case. The Indians lost in each of the cases cited by

Petitioner. The reason was a poor factual foundation for each of these cases. Unlike those cases the present case has a sound factual foundation.

The District Court below found that the Tribe had established an "extensive tourism program designed to bring income and employment to the Reservation" (Pet. App. 39-A). There are ample game and fish on the Reservation. The Reservation is "well-suited to support elk as well as other game" (Pet. App. 40-A). As a major component of this tourism program, the Tribe "in order to better manage and control its wildlife resources...has adopted hunting and fishing ordinances" (Pet. App. 39a). The Court found the Tribe to have "a comprehensive fish and game policy together with an adequate and enforceable set of Tribal ordinances" (Pet. App. 47a). Finally, the State and Tribe entered into a Stipulation which states "...the [New Mexico] Department [of Game & Fish] considers that the hunting and fishing ordinances of the Tribe presently maintain the fish and

wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation". (emphasis added, Appendix at 33a,34a).

The State further was found to have had no recent involvement in what was expressly described as the Tribe's "exclusive" fish and game management program (Pet. App. 41-a). Further, there were found "conflicts" between Tribal regulations and those of the states (Pet. App. 41-a). Finally, a strong Federal presence was noted leading to the conclusion "The fish and game ordinances and regulations of the Mescalero Apache Tribe ...(were) authorized and sanctioned by the federal government and accompanied by active federal support of the fish and game program on the Mescalero Reservation" (Pet. App. 51-a). This particularly compelling combination of facts has never been presented to this Court, or been brought before any other Federal Appellate Court. These findings would be

sustained on review, were review ordered, as evidenced from the Stipulation entered into by the parties here (Appendix).

B. The Legal Conclusions.

Briefly the legal issues in the instant case were framed by the Tenth Circuit as follows. The controversy was defined as involving "a challenge to the State of New Mexico's attempt to regulate the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache Reservation". (630 F.2d at 725). Assuming the applicability of the States regulations, the Court found they "would render much of the Tribal regulatory scheme a nullity" (630 F.2d at 733). While the State has a "legitimate interest in the conservation of its wildlife" it was held "the Tribe activities do not threaten that interest in any way" (630 F.2d at 733). Finally, the Court expressly affirmed the following finding: "The unquestioned importance to the Tribe of the game revenues contributed to the

...determination that Tribal self-government was infringed upon" (630 F.2d at 734). These conclusions were compelled by the facts. As to the bearing of the other hunting and fishing cases cited by the State, while the Tribe actually may not agree with the results, they have no application here.

If certiorari were granted, and while the Tribe is confident it would prevail, it does not believe relief would easily be accorded those tribes who have not similarly attended to their facts. Therefore, despite enjoying the prospect of having the issues reviewed by the Court, the Tribe believes review would be a waste of the Court's time.

III. THE TENTH CIRCUITS FINDINGS OF PREEMPTION AND INFRINGEMENT ARE SOUND, NARROWLY APPLIED TO THE SITUATION, AND WORK ABSOLUTELY NO DISRUPTION OF WILLIAMS v. LEE.

The State argues that a court may make a finding of Tribal sovereignty only

after applying the (1) federal preemption and (2) infringement of tribal government tests. According to the State's approach, a court may conclude that sovereignty exists only if one of these two tests oust state jurisdiction.

The State's argument is contrary to every statement on the subject ever made by this Court. This infringement test of Williams v. Lee, 358 U.S. 217 (1959) would not exist if sovereignty did not exist independent of the test since it is precisely state infrigement of tribal sovereignty which is forbidden by the test. "Essentially, absent governing acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Id at 220. The right to make the rules by which one is governed is the essence of sovereignty and this right is assumed to be one of the attributes of Indian tribes. The question is whether state action infringes on that right, not whether the right itself exists.

As for federal preemption, this Court in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, (1980) specifically stated that "Tribal reservations are not States, and the differences in the form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other. The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been preempted by operation of federal law." Thus, sovereignty is not a conclusion which derives from analysis. Rather it is an aid to analysis. It exists unless specifically taken away by Congress. White Mountain Apache Tribe v. Bracker, supra; Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978); United States v. Wheeler, 435 U.S. 313 (1978).

The Tenth Circuit's approach of assuming sovereignty and then applying the federal preemption and tribal infringement tests in light of that sovereignty is precisely the approach required

by this Court. It is pertinent that the Tenth Circuit explicitly states it does not rely on tribal sovereignty alone to conclude that State power is preempted (630 F.2d at 727).

A. Federal Preemption.

The Tenth Circuit Opinion makes clear that its preemption analysis must be considered in "light of the Tribe's inherent powers over reservation land and wildlife..." (Pet. p. 14a). Central to the Court's entire opinion is the fact that wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." United States v. Winans, 198 U.S. 371, 381 (1904). The Tribe has inherent authority over wildlife, stemming largely from the traditional reliance on wild game for basic survival needs. See F. Cohen, Handbook of Federal Indian Law 286.

Utilizing the concept of tribal sovereignty over wildlife to aid its determination, the Tenth Circuit found

six factors which had preemptive effect: (1) The Treaty of July 1, 1852; (2) the New Mexico Enabling Act, 36 Stat. 557 (1910); (3) the Indian Reorganization Act of 1934 (IRA) 25 U.S.C. Section 461 et seq; (4) the Tribal Constitution and ordinances enacted pursuant to the IRA; (5) extensive federal developmental assistance; and (6) the negative inferences from Public Law 280.

The starting point of the Court's analysis is the Treaty of July 1, 1852 which places the Tribe "under exclusive federal jurisdiction." This provision in turn sheds light on the Enabling Act which places Indian lands in New Mexico "under the absolute jurisdiction and control of the Congress of the United States." "In the area of resource management, the treaty language in this case suggests the 'absolute' jurisdiction is indeed 'exclusive' jurisdiction" (Pet. 22a).

The State objects that this federal dominance preempting state game and fish

laws cannot be squared with the case of Mescalero Apache Tribe v. O'Cheskey, 625 F. 2d 967 (10th Cir. 1980) reh. denied, August 25, 1980, Petition for Certiorari docketed November 20, 1980, in which no preemption of state taxing power was found. Even assuming arguendo the correctness of the O'Cheskey decision, the Tenth Circuit specifically distinguished the dual regulatory scheme involved in the present case, from the dual taxing scheme involved in the O'Cheskey case. Dual regulatory schemes of necessity create mutual dislocations. Pet. 13a at f.n. 11; State of Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134, 158 (1980). The many conflicts between the Tribe's seasons, bag limits, and other hunting regulations and those of the State, bear out the accuracy of the observation by the Tenth Circuit. Dual regulation of wildlife is probably inherently inconsistent with the trusteeship duty of the Tribe to manage its wildlife for the benefit of its members. Cf. Pet. 29a.

Additional sources of federal preemption are the Indian Reorganization Act and Tribal Ordinances passed pursuant to the Tribe's federally-approved Constitution. The Tribe's Constitution specifically authorizes resolutions governing hunting and fishing on the Reservation. In fact, the Tribe's hunting and fishing program implements an overriding federal policy. Where a tribal enactment implements an overriding federal policy, it has preemptive effect. (Pet. p. 16a), citing Fisher v. District Court, 424 U.S. 382, 390 (1976); Cf. United States v. Mazurie, 419 U.S. 544, 556-557 (1975).

That an overriding federal policy is involved here is apparent from the extensive federal participation in the Tribe's wildlife management program. This federal participation is itself preemptive of state jurisdiction. Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission, 591 F.2d 75 (4th Cir. 1978), Petition for Writ of Certiorari voluntarily dismissed, 446 U.S. 960 (1980).

The federal policy of leaving tribes free to manage their own wildlife is also implied in Public Law 280. While that statute gave states the unilateral option of assuming limited civil and criminal jurisdiction over Indian country (until amended in 1968), it nevertheless protected tribes from losing "any right, privilege, or immunity afforded under Federal treaty, agreement, or statutes with respect to hunting, trapping or fishing or the control, licensing, or regulating thereof." The negative inference is inescapable that these matters are in exclusive tribal and federal control.

It is clear that the Tenth Circuit made "a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." White Mountain Apache Tribe v. Bracker, 448 U.S. at 145. This case deals with value generated almost entirely on the Reservation

in which the Tribe has a significant interest. There is no perceivable state interest since they do not stock tribal waters and the Tribe's game is either non-migratory, or the effect of its migration is to bolster state hunting off of the Reservation (Pet. pp. 12a-13a).

Furthermore, while the income from tribal programs is significant to the Tribe, the scope of the Tribe's program is miniscule compared to that of the state. For example, in a recent year the Tribe sold 50 elk licenses, while the state sold 14,000. Ten tribal antelope licenses were available compared to 3500 for the state. Tribal deer licenses permitted the taking of 500 deer; the state issued 100,000 deer licenses (Pet. pp. 12a-13a). The federal and tribal interests are thus overwhelming while the State's interest is minimal given the facts of this case. There is no conclusion to be drawn other than that the state authority over hunting and fishing on the Mescalero Apache Reservation has been completely preempted.

B. Tribal Self-Government.

The Tenth Circuit noted that the purpose of the Williams v. Lee tribal-infringement test is to "(seek) an accommodation between the interests of the tribes and the Federal Government, on the one hand, and those of the State, on the other." Washington v. Confederate Tribes, 447 U.S. at 134 (Pet. 25a-26a). In that regard, it is very similar to the purpose of the preemption test of White Mountain Apache Tribe v. Bracker, supra.

As the Stipulated facts show, the State has virtually no interest while the Tribe's interest is paramount. Thus, in accommodating state and tribal interests, the scale leans heavily in the Tribes' favor.

As has been shown, conflict between the Tribe's regulatory scheme and that of the State is pronounced. Dual regulatory schemes have produced precisely the mutal dislocation alluded to by this Court in Washington v. Confederate Tribes, supra

447 U.S. at 158. The plain fact is that Tribal and State interests are not in harmony. The Tribe sets its bag limits and seasons consistent with the needs for conservation on the Reservation. The Tribe is the only entity with the proper information to do that. The State, in catering to the public at large, may feel it is appropriate to prohibit elk and antelope hunting by the same person in consecutive years so that this hunting opportunity might be spread around. The Tribe may desire to build good will in its tourism business by allowing such hunting in consecutive years. The record shows that the State has arrested non-Indian hunters after they have departed from the Reservation in the past (Appendix at 29a-33a). Nothing could be more palpably injurious to the Tribe's good-will. Dual regulations are a direct interference with tribal self-government. The Tenth Circuit Opinion is sound in this regard and need not be reviewed.

C. State Interests.

The State of New Mexico does have a vested interest in seeing that wildlife resources are protected. The Tribe has done nothing to infringe on that interest. If anything, the Tribe has substantially added to the States aggregate wildlife resources in the area near the Tribal reservation.

The State also raises the specter of twenty-six anarchistic Indian enclaves, each a "haven for non-Indian activity". What is to occur in the individual no-man's lands is not specified, but again there never has been any showing of a deterioration of the wildlife resource or any other state resource on the Mescalero Reservation. The thought of autonomous Indian enclaves each wrenching the State overall objective of sound wildlife management is not confirmed, or even hypothetically possible here. The State further perceives in this case the seeds of a growing Indian commercial opportunism, an advantage-seeking that uses

the fortuitous or contrived situs of the reservation alone to avoid state proscriptions, and therein reap an unjust windfall. There is nothing in the record below that would even permit a theory of such tribal opportunism. Even should the Tribe one day be turning a profit on all of its developing enterprises, the State would have to show it was not from superior efficiency, but some demonstrable contrived competitive advantage, that the Tribe was prospering. This issue is not before the Court.

As to the propriety of on-reservation gambling and liquor sales involving non-Indians, these considerations are governed by their own guiding principles, and have no bearing on this case.

CONCLUSION

This State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

In The
United States District Court
For The District Of New Mexico

MESCALERO APACHE TRIBE,
Plaintiff,

No. CIV 395 M

vs.

STATE OF NEW MEXICO and
WILLIAM S. HUEY, Individually
and as Director of the New
Mexico Department of Game
and Fish, or his Successors
In Office,
Defendants.

STIPULATION

Plaintiff Mescalero Apache Tribe and Defendants State of New Mexico and William S. Huey stipulate as follows:

I. Scope and Use of Stipulation

1. This Stipulation is made for the sole purpose of being introduced in evidence before the District Court to be considered in adjudicating the legal issues presented in this proceeding.

2. The facts and evidence contained in this Stipulation are for purposes of this proceeding only and any appeal taken in connection herewith. They shall not be deemed res judicata for any other proceeding nor shall any party hereto be collaterally estopped or otherwise bound by them in any other proceeding.

II. General Facts

1. The Mescalero Apache Tribe is a federally recognized Indian Tribe governed by its revised constitution of January 12, 1965, which was adopted pursuant to 25 U.S.C. 476. The government body of the Mescalero Apache Tribe is duly recognized by the Secretary of the Interior of

the United States.

2. The Mescalero Apache Tribe occupies the Mescalero Apache Reservation which is presently situated wholly within Otero County, New Mexico.

3. Indian lands within the State of New Mexico consist of nineteen Indian pueblos including Taos, Picuris, San Juan, Santa Clara, Pojoaque, Nambe, San Ildefonso, Cochiti, San Felipe, Santo Domingo, Sandia, Isleta, Jemez, Santa Ana, Zia, Tesuque, Zuni, Acoma and Laguna, and seven Indian reservations including Mescalero Apache Reservation, Jicarilla Apache (Alamo) Reservation, the Navajo (Canoncito) Reservation, the Navajo (Ramah) Reservation, and the Ute Mountain Reservation. The relevancy of this fact is not conceded by the Mescalero Apache Tribe.

4. The nineteen Indian pueblos and seven Indian reservations located within the State of New Mexico comprise

7,348,563 acres or 11,482 square miles. The relevancy of this fact is not conceded by the Mescalero Apache Tribe.

III. Treaty of July 1, 1852.

1. At least one representative of the Mescalero Apache Tribe signed a treaty with the United States of America dated July 1, 1852, 10 Stat. 979, which submitted the tribe and its members to the laws, jurisdiction, and government of the United States of America.

2. Article 9 of the Treaty of July 1, 1852, 10 Stat. 979, provided that the United States government would designate, settle and adjust the boundaries of the signatories to the treaty. The terms of the Treaty did not designate any territory as a reservation for the Mescalero Apache Tribe.

3. In 1855 the Mescalero Apache Tribe and representatives of the United States signed a treaty which did in fact

designate reservation boundaries for the Mescalero Apache Tribe, but this treaty was never ratified by the United States Senate. The Mescalero Apache Tribe does not concede the relevancy of this fact.

4. The Reservation of the Mescalero Apache Tribe was originally created by a Presidential Executive Order in 1873. Subsequent Presidential Executive Orders relating to the Mescalero Apache Reservation altered the boundaries of the Reservation by deleting from or adding to the original boundaries of the 1873 Executive Order Reservation.

5. The Presidential Executive Orders of February 2, 1874, October 20, 1875, May 19, 1882, and March 24, 1883 each successively cancelled the immediately prior Presidential Executive Order establishing the Mescalero Apache Reservation. The present boundaries of the Reservation are as set forth in the Executive Order of March 24, 1883.

6. The Presidential Executive Orders of March 2, 1909 and October 20, 1910, placed parts of the Mescalero Apache Reservation in the Alamo National Forest and subjected these lands to the laws pertaining to national forests and provided for use therein by the Indian Service and by individuals comprising the Mescalero Apache Tribe. A Presidential Executive Order of February 17, 1912, rescinded the Presidential Executive Orders of 1909 and 1910 insofar as they applied to the Mescalero Apache Reservation and restored the reservation in all respects to the status existing prior to the Presidential Executive Orders of March 2, 1909 as though the inclusion of the lands within the Alamo National Forest had not been ordered.

IV. Inn Of The Mountain Gods.

1. The Inn of the Mountain Gods is located within the boundaries of the Mescalero Apache Reservation. The Inn is a large resort complex consisting of a

hotel, stocked lake, golf course, tennis facilities, and swimming pool.

2. The development and construction of the Inn of the Mountain Gods resort complex was principally financed by the Economic Development Administration (EDA), an agency of the United States Department of Commerce.

3. The Inn of the Mountain Gods resort complex was financed through EDA and other federal funds and one loan of $6,000,000 from the Bank of New Mexico. 90% of the Bank of New Mexico loan is guaranteed by the Secretary of the Interior under the Indian Financing Act of 1974, 25 U.S.C. Sections 1451-1543. 10% of the loan is guaranteed by the Tribe through an assignment of Certificate of Deposit in the amount of $600,000 to the Bank of New Mexico. The source of these assigned funds is Tribal funds previously deposited with the Secretary of Interior. $5,400,000 of the loan (which bears interest at an annual rate of 1.1%) was

assigned to the New Mexico State Investment Council, a transaction provided for in the initial loan document.

4. The Mescalero Apache Tribe has constructed certain additional facilities at the Inn of the Mountain Gods utilizing both EDA grants (50%) received after the initial grant and Tribal funds (50%). The additional construction includes trap and skeet shooting (clay bird) range, a stables complex, a recreation building related to the golf course, a kitchen addition, toilet facilities for the golf course, air conditioning for the hotel rooms, various signs, paved walkways on the golf course, additional tennis courts, paddle tennis courts and a water treatment facility. Portions of the above are considered public works by EDA and are funded 100% with federal funds.

5. At least 97% of the guests at the Inn of the Mountain Gods are non-Indians from off the Reservation.

6. The Inn of the Mountain Gods is a part of the tourism program established by the Mescalero Apache Tribe to replace anticipated declining income from lumbering enterprises which historically have been the largest income producing activities within the Mescalero Apache Reservation.

7. The tourism program of the Mescalero Apache Tribe is designed to attract non-Indians to the Reservation as well as to Sierra Blanca Ski Resort which is a Tribal enterprise located off the Reservation. The hunting, fishing, camping and picnicking program of the Mescalero Apache Tribe is a part of its overall tourism program. Package hunts of big game animals are held to help stimulate business at the Inn of the Mountain Gods. Package hunts normally occur between the summer tourism season and the winter ski season. The purpose of the tourism program is to provide income for the Mescalero Apache Tribe which may be used for its governmental

purposes and economic development.

V. Hunting and Fishing Program - Mescalero Apache Tribe

1. Pursuant to Article XI, Section 1(c) of the revised constitution of the Mescalero Apache Tribe, the Tribal Council has adopted a general hunting and fishing ordinance purporting to govern all persons, Indian and non-Indian, hunting and fishing on the Mescalero Apache Reservation. The Tribal Council has also adopted an ordinance specifically for the 1977 hunting and fishing seasons which specifies the Mescalero Apache Tribal rules and regulations governing hunting and fishing on the Reservation for that particular year. Ordinance 77-1 specifically provides: "No state license of any kind shall be necessary for any person." The State of New Mexico does not stipulate or concede that this provision in any way prohibits it from imposing a licensing requirement on non-Indians hunting or fishing on the

Mescalero Apache Reservation.

2. Any non-Indian seeking to hunt or fish on the Mescalero Apache Reservation must purchase a tribal license. Game tags are issued with each tribal license. These game tags are required by tribal regulation to be attached to game taken on the Mescalero Apache Reservation.

3. The Mescalero Apache Tribe presently employs seven full-time tribal conservation officers who assist a Bureau of Indian Affairs (BIA) range conservationist with certain game management functions. The BIA is also able on occasion to provide additional technical vassistance. These tribal conservation officers assist the BIA range conservationist in making aerial surveys and pellet group transect studies to determine the deer, elk, antelope and bear populations on the Mescalero Apache Reservation in order to recommend to the Tribal Council bag limits and seasons for these big game animals. These recommen-

dations are submitted to Tribal Council for its consideration in setting bag limits and seasons for the Mescalero Apache Tribe.

4. All tribal conservation officers have received training in game and fish management and law enforcement. One officer has approximately sixteen years experience in game and fish management; one has approximately nine years work experience; two have approximately two years experience each; and three have approximately six months experience each.

5. The Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, operates a national fish hatchery on the Mescalero Apache Reservation and, pursuant to an agreement with the Tribe, provides technical assistance in the management and development of fishery resources in Reservation waters and it likewise provides fish for stocking Reservation waters. The agreement,

entered into in 1959, also provides that the Mescalero Apache Tribe will establish regulations for the conservation of fishery resources which insofar as possible will be in conformity with the regulations of the State of New Mexico. The fish hatchery is located on Reservation land leased to the Bureau of Sport Fisheries and Wildlife of the Department of Interior by the Tribe. The fish hatchery serves other Indian reservations and pueblos and federal facilities in New Mexico and surrounding states.

6. There are no natural lakes within the Mescalero Apache Reservation. Several man-made lakes have been constructed over the years with federal funds, some of which also have picnic and camping facilities constructed by the Tribe. The State of New Mexico has never stocked any lake within the Mescalero Apache Reservation. Prior to 1970 the New Mexico Department of Game and Fish and the bureau of Sport Fisheries and Wildlife stocked streams within the Reservation.

Between 1970-76, the Department stocked part of one stream on the Reservation and since 1976 has not stocked this stream. All other waters within the Reservation are stocked exclusively with fish from the National Fish Hatchery at Mescalero. A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation, based upon periodic surveys of all Mescalero Apache Reservation fishing waters.

7. An elk herd numbering 162 elk was released on the Mescalero Apache Reservation in 1966 and 1967. These elk were donated by the National Park Service. The New Mexico Department of Game and Fish issued a permit for the importation of these elk from Wyoming into New Mexico and generally encouraged this importation. There was some opposition to this importation from one federal agency. It is estimated that there were 13 elk in the general area of the Reservation at

the time of the importation in 1966-67. It is estimated that there are approximately 1,200 elk in the general area of the Reservation at the present time.

8. The antelope population within the Mescalero Apache Reservation is non-migratory and these animals seldom, if ever, leave the exterior boundaries of the Mescalero Apache Reservation. A part of the elk, deer and bear populations of the Sacramento Mountains range freely on and off the Mescalero Apache Reservation throughout the year.

9. Horses, cattle and big game compete with one another for the available forage on the Mescalero Apache Reservation. The Tribal Council has made some effort to reduce the wild horse population on the Reservation by entering into one or more contracts for their capture and sale. These wild horses, estimated to number 2,400, unlike the cattle and big game, do not generate significant revenue for the benefit of

the Mescalero Apache Tribe.

10. The New Mexico Department of Game and Fish has provided the Mescalero Apache Tribe with any fish or wildlife management assistance which the Tribe has requested, including the training of tribal conservation officers. Such requests have been limited.

11. The hunting brochures written, printed and distributed by the Mescalero Apache Tribe for the 1971-1976 seasons state that all New Mexico hunting regulations apply to hunting on the Reservation.

12. In response to a Court order previously entered in this cause, the President of the Mescalero Apache Tribe advised all hunters of the Mescalero Apache Reservation by a letter dated September 2, 1977 that all hunters on the Mescalero Apache Reservation are required to hold a 1977 New Mexico hunting license and any game taken from the Reservation

must have the Mescalero and New Mexico game tag attached thereon.

13. Federal matching monies (through the Pittman-Robertson Act, 16 U.S.C. 669 et seq. (hunting) and the Dingle-Johnson Act, 16 U.S.C. 777 et seq. (fishing) are allocated to states on a ratio that involves the number of license buyers in the state and the number of acres in the state. To qualify for federal monies under the Pittman-Robertson and Dingle-Johnson acts, the New Mexico Department of Game and Fish may not divert any license fees to any other purpose than the administration of the Department. The territorial area of the Mescalero Apache Tribe (approximately 460,384 acres) is taken into account in calculating New Mexico's share of Pittman-Robertson and Dingle-Johnson Act funds as are the number of state-licensed hunters and fishermen who hunt or fish on the Reservation. No Dingle-Johnson funds have been spent directly within the Mescalero Apache Reservation within the

last 6-8 years. In recent years the Pittman-Robertson formula has resulted in an average of $1.56 in federal funds to New Mexico per state-licensed fishermen.

14. For the years 1972 through 1976, The Mescalero Apache Tribe issued the following number of fishing permits:

1972	9,521
1973	10,985
1974	9,135
1975	19,454
1976	29,163
Total	78,258

State of New Mexico fishing licenses have been required each year for non-Indian fishermen either by the Tribe or by court order.

15. Since 1972 approximately 2500 non-Indian hunters have hunted on the Mescalero Apache Reservation. State of New Mexico hunting licenses have been

required each year for non-Indian hunters either by the Tribe or court order.

VI. Hunting and Fishing Program - State of New Mexico

1. There is an interrelationship between the 7,348,563 acres or 11,482 square miles on Indian land within the State of New Mexico and other areas of the State of New Mexico insofar as management and conservation of fish and wildlife are concerned. The quantitative and qualitative aspects of this interrelationship are disputed by the parties.

2. The New Mexico Department of Game and Fish has maintained a fish and wildlife management and conservation program within the State of New Mexico since 1895.

3. The New Mexico Department of Game and Fish is charged by state statute with the responsibility of protecting, conserving and regulating the fish and wild-

life resources within the New Mexico. The Tribe does not stipulate that this responsibility legally extends to its Reservation. In exercising its statutory responsibility, the New Mexico Department of Game and Fish utilizes fish and wildlife management principles (e.g. herd management concept) which take into consideration the effects of the natural resources of water, plants, soil and animals among other things on the fish and wildlife resources. The New Mexico Department of Game and Fish conservation and management programs recognize that fish and wildlife populations and their habitats are interrelated and comprise a major portion of a complex and dynamic network of relationships, which are an ecosystem. The New Mexico Department of Game and Fish considers these factors in formulating its fish and wildlife conservation and management programs and employs an ecosystem approach, which demands reasonable management of ecosystems and all species contained therein.

4. Indians, non-Indians, residents and non-residents have equal fishing and hunting opportunities on non-reservation public waters and lands within the State of New Mexico.

5. An essential management and conservation mechanism utilized by both the New Mexico Department of Game and Fish and the Mescalero Apache Tribe in controlling the annual harvest of fish and wildlife is the regulation of the number of fishing and hunting licenses issued in conjunction with the length of each hunting or fishing season.

6. The New Mexico Department of Game and Fish is conducting fish and wildlife research projects in an effort to identify existing conditions and to anticipate the future supplies and demands upon the fish and wildlife resources in New Mexico. These studies have assisted in identifying the effects of poaching on the fish and wildlife resources. No New Mexico Department of Game and Fish per-

sonnel have entered the Mescalero Apache Reservation to conduct any such fish or wildlife research within the Reservation since 1967.

7. The New Mexico Department of Game and Fish employs 142 commissioned officers who have received training in game and fish management as well as wildlife law enforcement. Within the last ten years, virtually every commissioned officer has had at least a college degree in game management or in a game management related field. In addition, every commissioned officer must attend and complete the State Police Academy law enforcement course and the three week game and fish management wildlife enforcement course as well as attend an annual week long in-service game and fish management and wildlife enforcement course.

8. The following Schedule A lists the Department of Game and Fish expenditures during the fiscal year periods 1971

through 1976.

These expenditures were made to provide an adequate and flexible operation for the protection of game and fish in the State of New Mexico. These expenditures were used for the propagation of game planning, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the State of New Mexico.

The schedule also indicates the actual Pittman-Robertson and Dingle-Johnson federal reimbursements that were received by the Department during the same period as matching funds under approved projects by the federal government.

The federal matching through Pittman-Robertson and Dingle-Johnson is allocated to the states on a formula of 40% in the ratio which the area of each state bears to the total area of all the states and

60% in the ratio which the number of persons holding paid hunting and fishing licenses.

The total land contribution of Indian lands is 9.4% of the total acreage in the State of New Mexico. The Mescalero Apache Tribe's acreage (approximately 460,384 acres) comprises of .0059 percent of the total New Mexico acreage.

SCHEDULE A

DEPARTMENT EXPENDITURES COMPARED
TO FEDERAL AID REIMBURSEMENT
FOR FISCAL YEAR 1971 - 1976

FISCAL YEAR	DEPARTMENT EXPENDITURES
60th (1971-72)	$ 2,751,935.39
61st (1972-73)	2,997,421.67
62nd (1973-74)	3,373,935.36
63rd (1974-75)	3,993,831.07

64th (1975-76)	4,457,005.23
65th (1976-77)	5,038,833.05
	$22,612,961.77

PITTMAN-ROBERTSON	DINGLE-JOHNSON	TOTAL FEDERAL MONIES RECEIVED
$ 458,777.97	$ 88,800.00	$ 547,577.97
523,116.10	70,808.87	593,577.97
490,319.43	98,306.83	588,626.26
583,821.26	129,676.30	713,497.56
594,791.66	400,194.30	994,985.96
907,930.27	171,407.61	1,079,337.88
$3,558,756.69	$959,193.91	$4,517,950.60

9. The New Mexico State Game Commission has, either upon request or upon its own initiative, amended its hunting and fishing proclamations to accommodate the preferences of the Mescalero Apache Tribe and other Indian tribes with respect to seasons, bag limits and other matters pertaining to hunting and fishing on the

Mescalero Apache Reservation and other Indian lands. All such amendments were consistent with adequate fish and wildlife management practices when made. At least one instance of continuing conflict is the State prohibition against the purchase of an elk license two consecutive years by the same person. Tribal ordinance does not contain any such prohibition.

VII. Law Enforcement Activities - State of New Mexico

1. Section 53-2-31, NMSA, 1953 Comp. provides that the hunting and fishing laws and regulations of the State of New Mexico are applicable to "...all Indians off the reservation within this state, or coming into this state from adjoining states, and to all persons hunting on any Indian reservation within this state..." except that no Indian is required to have a license to hunt or fish within the limits of the Reservation where he resides. The State of New Mexico has

enforced and intends to continue to enforce its hunting and fishing laws and regulations against non-Indians hunting and fishing on Indian lands, including the Mescalero Apache Reservation. Although all enforcement against non-Indians has in fact taken place off the Reservation, the State of New Mexico does not stipulate to a lack of jurisdiction to go onto the Reservation for such enforcement.

2. The State of New Mexico published literature for the use of the general public which states:

> PRIVATE OR INDIAN LANDS
>
> Obtain permission before hunting on private or Indian lands. Nothing in this proclamation shall be construed to authorize hunting on any privately owned land without the landowner's permission nor hunting on any Indian reservation except in conformity with regula-

tions of the State Game Commission and of the Indian tribe.

Indian Reservations

Permission must be obtained before going on any Indian reservation to hunt or fish. A state license is required for non-Indians, in addition to the tribal permit. For each reservation listed, the tribal council has imposed further restrictions within the framework of season dates set forth below. In a few cases, no hunts are offered on the species listed. All dates below refer to 1978 unless otherwise indicated.

The required tribal permits are available only from the tribe involved. For exact information on season dates and availability of permits, contact the tribe directly.

3. In April of 1969, Wendell Chino, President of the Mescalero Apache Tribe, wrote a letter to the New Mexico Department of Game and Fish, as well as to various other agencies including several federal agencies, informing them that their personnel would no longer be welcome within the Reservation without tribal permission. Since that time, in order to avoid the possibilty of conflict or confrontation, New Mexico Department of Game and Fish officers have not entered the Mescalero Apache Reservation to enforce state fish and game laws and regulations.

4. The hunting and fishing laws and regulations of the State of New Mexico have never been and are not now enforced against Indians, including members of the Mescalero Apache Tribe, with respect to hunting and fishing activities within Indian lands.

5. The only documented cases of enforcement of hunting and fishing laws

and regulations on the part of the State of New Mexico with respect to hunting and fishing activities on Indian land involve non-Indians.

6. In furtherance of their law enforcement duties, New Mexico Department of Game and Fish officers routinely stop persons to ascertain whether the game or fish in their possession was legally taken. Until such a stop is made, it is impossible for the officer to determine where the game or fish were taken and whether such game or fish were taken in accordance with the game and fish laws and regulations of the State of New Mexico.

7. Two Louisiana hunters, Messrs. Shaw and Oliver, holders of Tribal elk licenses, each killed an elk within the Mescalero Apache Reservation in 1976. The State of New Mexico informed the United States Fish and Wildlife Service that these elk had been killed without New Mexico hunting licenses and one of

the two hunters had his elk meat confiscated by federal agents. New Mexico State criminal charges were brought against both Oliver and Shaw in Magistrate Court in Otero County, New Mexico, and each party plead guilty to the charges and each party paid a $600.00 fine. The Mescalero Apache Tribe offered to pay their legal expenses if they would challenge the legality of the charges brought against them in the State of New Mexico.

8. On October 6, 1977, New Mexico Department of Game and Fish officers questioned two hunters, Messrs. Crumley and Moretz, who stated that they had been hunting on the Mescalero Apache Reservation without State hunting licenses and that they had been told by an employee at Gibson's in Ruidoso that a State hunting license was not necessary for hunting on the Mescalero Apache Reservation until a kill had been made. The Department of Game and Fish officers did not issue citations for hunting without a State of New Mexico hunting license in this in-

stance. Employees at Gibson's in Ruidoso deny making any such statement to Messrs. Crumley and Moretz and Gibson's continues to serve as a vendor of state licenses.

9. On or about October 6, 1977, an individual observed elk meat being packed in a Ryder Rental truck on the Mescalero Apache Reservation and, on his own initiative, he voluntarily related to a New Mexico Department of Game and Fish officer that 48 elk had been killed by non-Indians in the package hunt on the Reservation in 1977. A New Mexico Department of Game and Fish officer checked the number of state elk licenses which had been sold in the area and found that 43 had been sold. It was also discovered that one of the non-Indian elk hunters on the Reservation had purchased a State elk license the previous year. It is contrary to state law but not contrary to Tribal ordinance to purchase an elk license two years in a row. In addition, it was learned that a non-resident juvenile hunter had not received a Hunter

Safety Certificate form his home state as required by the hunting and fishing laws of the State of New Mexico. Based upon this information, a message was given to New Mexico State Police officers to be on the lookout for the Ryder Rental truck. On October 6, 1977, two employees of the Mescalero Apache Tribe, John F. Frye and Reese Tatum, were transporting packaged and frozen elk meat in a Ryder Rental truck from the Mescalero Apache Reservation to El Paso, Texas, and in transit the rental truck driven by Reese Tatum, was stopped for excessive speed by New Mexico State Police Officer David L. Skinner approximately 15 miles south of Alamogordo, New Mexico, John F. Frye volunteered the information that the truck was transporting elk meat and agreed to a search of the vehicle by Officer Skinner. Messrs. Frye and Tatum were subjected to a routine light personal frisk for the protection of Officer Skinner. Officer Skinner asked the two individuals to return with him to Alamogordo, and both Frye and Tatum

voluntarily consented to do so. At Alamogordo State Police Headquarters, New Mexico Department of Game and Fish Officer, Tim Barraclough, after obtaining written consent to search the vehicle from Mr. Frye, began a search of the rental truck to determine whether any of the elk meat belonged to any person who had failed to purchase a state license. The consent to search was orally withdrawn by an attorney for the Tribe and the search thereupon ceased. No arrests were made.

10. The New Mexico Department of Game and Fish has developed a fish and wildlife law enforcement program entitled Operation Game Thief in an effort to encourage public participation in protecting and conserving the fish and wildlife within the State of New Mexico by offering rewards to persons for information concerning alleged violations of the fishing and hunting laws and regulations of the State of New Mexico.

11. Based on information received from hunters filling out questionnaires sent out by the New Mexico Department of Game and Fish and on informal information received from others, the Department considers that the hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation.

VIII. Financial Matters

1. From at least 1971 through 1974 all of the big game licenses including deer, elk and bear, authorized by the Mescalero Apache Tribe were sold. During this period a large number of fishing permits was likewise sold by the Mescalero Apache Tribe.

2. All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1975-

1976 hunting season including deer, elk and bear, were sold. During this period 19,454 fishing permits were likewise sold by the Mescalero Apache Tribe.

3. All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1976-1977 hunting season, including deer, elk and bear, were likewise sold by the Mescalero Apache Tribe.

4. All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1977-1978 hunting season, including deer, elk, bear and antelope, were sold except four of the ten antelope licenses which were authorized for the first time in 1977. During this period an undetermined number of fishing permits were likewise sold by the Mescalero Apache Tribe.

5. Many applications for big game licenses and package hunts have had to be turned down each year that they have been

made available by the Mescalero Apache Tribe because the number of such applications has exceeded the number of licenses and package hunts that have been made available by the Tribe.

6. For the calendar year 1976, the direct Tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods, and campground and picnicking permits was $269,140. For the Calendar year 1977, the direct Tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods, and campground and picnicking permits was $271,520. There was an undetermined amount of indirect income from non-hunting spouses and children staying at the Inn of the Mountain Gods in conjunction with participants in the package hunts. The Mescalero Apache Tribe in turn used part of this income to pay Tribal guides for hunters participating in the package hunts.

7. Based on the number of hunting and fishing permits and package hunts sold by the Mescalero Apache Tribe and the patronage enjoyed by the Inn of the Mountain Gods and other recreational facilities on the Mescalero Apache Reservation during the 1977-1978 hunting and fishing seasons, it is anticipated that the direct Tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods, and the campground and picnicking permits for fiscal year ending June 30, 1978 will be greater than that realized in previous years.

8. The revenues the Mescalero Apache Tribe receives from the sale of hunting and fishing, and picnicking and camping permits and package hunts at the Inn of the Mountain Gods has increased from $7,787 in 1961 to $269,140 in 1976. Prior to and during this period the State of New Mexico has enforced its hunting and fishing laws and regulations against non-Indians hunting or fishing within the

Mescalero Apache Reservation. After they have departed the Reservation.

9. The revenues of the Inn of the Mountain Gods have increased annually since it opened in July of 1975.

10. The State of New Mexico will suffer a loss of direct revenue and Pittman-Robertson and Dingle-Johnson funds if it is enjoined from enforcing its licensing requirements against non-Indians hunting and fishing on Indian lands within the State of New Mexico, including the Mescalero Apache Reservation.

IX. Miscellaneous Facts

1. The vast majority of the non-Indian hunters and fishermen on the Mescalero Apache Reservation are non-residents of the State of New Mexico.

2. The public highways of the State of New Mexico as well as other public

facilities and services are available for use by persons traveling through the State of New Mexico to hunt and fish on Indian lands within the State of New Mexico, including the Mescalero Apache Reservation.

3. The State of New Mexico provides some services and benefits to members of the Mescalero Apache Tribe residing on the Mescalero Apache Reservation. The relevancy of this fact is not conceded by the Mescalero Apache Tribe.

Respectfully submitted,

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No. 82-331

In the Supreme Court of the United States

October Term 1982

STATE OF NEW MEXICO and HAROLD F. OLSON, Individualy and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALERO APACHE TRIBE,

Respondent.

BRIEF OF AMICI CURIAE STATES OF UTAH, ARIZONA, CALIFORNIA, MONTANA, NEVADA, SOUTH DAKOTA, WASHINGTON AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit complied with this Court's instructions to reconsider its original decision in this case in light of *Montana v. United States*, 450 U.S. 544 (1981).

2. Whether the Mescalero Apache Tribe has "inherent authority" over wildlife within the Mescalero Apache Reservation which pre-empts the application of state game and fish laws to non-Indians hunting or fishing within the reservation.

3. Whether the application of state game and fish laws to non-Indians hunting and fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe to self-government.

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INTEREST OF AMICI STATES

This case is of extreme importance to all States having large tracts of Indian land within their borders. The decision of the Tenth Circuit Court of Appeals below, if allowed to stand, will result in a virtual confiscation of important wildlife resources. In practical effect, certain species of public wildlife resources migrating on and off Indian reservations would be converted to the status of tribal livestock while they were on reservation lands. The State of New Mexico and the *amici* States

clearly have an ownership interest in trust and a management responsibility over game species within their borders which is not destroyed or defeased when the animals cross from state lands to reservation lands.

For example, the State of Utah contains within its borders two major Indian reservations—the Uinta-Ouray Reservation and portions of the Navajo Reservation—comprising millions of acres. These reservations contain trust lands and also a great amount of non-trust lands, including federal, state, and private property. Many species of game and fish abound within these reservations, such as deer, elk, antelope, bighorn sheep, pheasants and chukar. Big game animals in particular do not remain year-round on the reservations but migrate freely, usually from summer ranges to winter ranges. For example, the northern portions of the Uinta-Ouray Reservation in northeastern Utah abut the Ashley National Forest on the south slope of the Uinta Mountains. During the spring and summer, the local deer and elk herds migrate from reservation lands up into the national forest for their summer range. During the fall and winter, these animals migrate down to lower elevations to escape the mountain snows, and cross back into the reservation. Such herds are managed as part of the state's overall game management plan—which includes season and harvest criteria—in order to maintain viable game populations within the State. Similar situations exist in all of the other *amici* States.

The *amici* States are also seriously concerned that the decision of the court below leaves a massive juris-

dictional vacuum. Indian tribes do not have the power to punish or try non-Indians for criminal offenses, absent a specific congressional authorization (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 [1977]), and no pre-emption, express or implied, has been made by Congress in this area. There are no general federal game laws, and nothing to grant tribal courts jurisdiction over non-Indians who violate tribal game ordinances. Therefore, if the holding of the court below is accepted and the states are forbidden to apply their game laws to non-Indians on the reservation, it would be impossible to prosecute non-Indians for acts committed on the reservation which violate both state game laws and tribal ordinances.

The lower court's decision, if allowed to stand, will have the potential of totally disrupting long established game management programs, and could divest the states of their sovereign rights to regulate and control the harvesting of game by non-Indian sportsmen within their borders.

REASON FOR GRANTING WRIT

I. *Preface*

The *amici* States fully support and concur in the points raised and argued by the State of New Mexico in its Petition. Rather than repeat those same arguments, the *amici* States hereby fully adopt and endorse the points discussed by the State of New Mexico in its Petition, and now proceed to make the few additional comments set forth below.

II. *The Decision of the Tenth Circuit on Remand Ignores This Court's Instruction to Reconsider the Case in Light of Montana v. United States*

Upon granting the State of New Mexico's previous petition for a writ of certiorari, this Court vacated the decision of the Tenth Circuit and remanded the case with the clear instruction that the Tenth Circuit should reconsider its decision "in light of *Montana v. United States*, 450 U.S. 544 (1981)." 450 U.S. 1036 (1981). On remand, however, the Tenth Circuit chose to distinguish this Court's opinion in *Montana*, and simply reinstated its previous decision based on this Court's decision in *Merrion v. Jicarilla Apache Tribe*, ... U.S. ....., 71 L.Ed. 2d 21 (1982).

On this point, the position of the *amici* states is identical to that ably set forth in the State of New Mexico's present petition for a writ of certiorari, which the *amici* states hereby adopt and support fully. Suffice it to say that the Tenth Circuit was in error to lightly brush aside the principles announced by this Court in *Montana*, and base the reinstatement of its previous decision on *Merrion* — which did not even deal with game and fish jurisdictional matters, but dealt instead with the authority of an Indian tribe to levy a mineral severance tax. As New Mexico points out, the *Merrion* case did not even address the issue of whether or not a state could levy a concurrent mineral severance tax.

It is abundantly clear that *Merrion* is irrelevant to the issues to be decided in this case, especially since this

Court specifically instructed the Tenth Circuit to review its decision in light of *Montana*. The issues to be resolved in this case were addressed by this Court in *Montana*, not *Merrion*, and the Tenth Circuit erred in ignoring the instructions of this Court on remand.

III. *State Regulation of Non-Indian Hunters Will Not Impair Tribal Sovereignty*

This Court made it abundantly clear in *Montana v. United States*, *supra*, that Indian tribes retain certain attributes of sovereignty to exercise jurisdiction over non-Indians only where the regulations promulgated have a clear and direct relationship to tribal self-government. However, the enforcement of New Mexico's game laws regulating non-Indian hunters on the Mescalero Apache Reservation—whether hunting on trust or non-trust lands—would not interfere with any attributes of tribal sovereignty or tribal self-government.

The tribal members are, of course, free to hunt and fish on the reservation and in so doing are not subject to state laws. The tribe is also free to formulate game and fish management programs within the reservation. The point to be made is that there is a big difference between tribal members fishing and hunting for their own subsistence, and the commercialization of hunting and fishing such as is presently being promoted on the Mescalero Reservation. The obvious drawing card for reservation hunting—from the Indians' point of view—is that they can offer out-of-state hunters a cheaper and more attractive hunt if those hunters do not have to obtain a

non-resident New Mexico license or abide by the State's general game and fish laws.

In this respect, the situation is not unlike that of the Indian "smokeshops" addressed by this Court in *State of Washington v. Confederated Tribes of Coalville Indian Reservation,* 447 U.S. 134 (1980). There is no valid reason why non-Indians, hunting on the reservation, should not be required to obtain a valid state hunting license. That requirement certainly does not interfere with any attributes of tribal self-government. The Tribe, in seeking to exempt non-Indian hunters from state law, is simply attempting to attract more hunters and thereby avail itself of the accompanying economic benefits and competitive advantages.

Aside from depriving the States of revenues from the sale of hunting and fishing licenses, the tribal commercialization of these wildlife resources can have a detrimental effect on game herds which migrate back and forth across reservation boundaries. The Tribe, and the lower court in making much ado about the tribe's interest in game on the reservation, appear to see the reservation's deer, elk, bear and antelope populations as tantamount to Indian livestock—comparable to a "natural resource" just like timber or an ore deposit. Indeed, no legitimate interest of the Tribe can be said to be threatened by state jurisdiction over non-Indian hunting unless this rather unorthodox view is accepted.

But forests and mineral deposits do not range freely on and off the reservation as do its deer, elk, bear and

antelope populations. This is not a case like the "put-and-take" fishing in *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F.2d 75 (4th Cir., 1978), on which the Tribe relies so heavily. Is it the Tribe's assertion that its alleged ownership of these animals goes through a semi-annual cycle of vesting and divesting as the game animals migrate back and forth across the reservation's boundaries? It cannot reasonably be argued that the State has an interest in such game animals only during the times they spend off the reservation.

State regulation of non-Indian sportsmen on Indian reservations cannot be said to impair tribal sovereignty, since such "sovereignty" extends only to the tribe's internal affairs. This case deals with the relationship between New Mexico and non-Indian sportsmen.

CONCLUSION

The holding of the Tenth Circuit Court of Appeals, if allowed to stand, threatens to tragically disrupt game management—not only in New Mexico but in every State having large tracts of reservation land within its borders.

For the foregoing reasons, coupled with the reasons set forth by Petitioner State of New Mexico, the *amici* States respectfully pray that a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Wilkinson, Attorney General of and counsel for the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing BRIEF OF AMICI CURIAE STATES OF UTAH, ARIZONA, CALIFORNIA, MONTANA, NEVADA, SOUTH DAKOTA, WASHINGTON AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI were served upon each of the following by mailing the same, postage prepaid, this 24th day of September, 1982, all in accordance with the Rules of this Court:

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OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
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Petitioners,

v.

MESCALERO APACHE TRIBE,
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On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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QUESTIONS PRESENTED

1. Whether the Mescalero Apache Tribe has inherent authority over wildlife within its Reservation which preempts state regulation of non-Indian hunting or fishing within the Reservation.

2. Whether the authority of the State of New Mexico to impose its game and fish laws on non-Indians hunting or fishing on the Mescalero Apache Reservation has been preempted by federal legislation or treaty stipulation.

3. Whether the application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe "to make its own laws and be governed by them" contrary to *Williams* v. *Lee*, 358 U.S. 217 (1959).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit on remand from the Supreme Court of the United States is reported at 677 F.2d 55 (10th Cir. 1982), and appears in the Appendix at 4a.[1] The original opinion of the United States Court of Appeals for the Tenth Circuit, which was previously vacated by this Court, is reported at 630 F.2d 724 (10th Cir. 1980), and appears in the Appendix at 9a. The judgment entered in this case by the United States District Court for the District of New Mexico on August 2, 1978, which appears in the Appendix at 35a, is unreported. The memorandum opinion of the District Court of August 2, 1978, which appears in the Appendix at 37a, is also unreported.

[1] "Appendix" refers to the appendix in the Petition for a Writ of Certiorari; "Respondent's Appendix" refers to the appendix in the Opposition to Petition for a Writ of Certiorari; "Jt. Appendix" refers to the Joint Appendix herein.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit, entered in this proceeding on remand from the Supreme Court of the United States, was filed on April 26, 1982 (Appendix at 2a). On June 25, 1982, Mr. Justice White extended the time within which to file a petition for writ of certiorari to and including August 25, 1982 (Appendix at 1a). The petition for writ of certiorari was filed on August 25, 1982, and was granted on November 15, 1982. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

TREATY AND STATUTORY PROVISIONS INVOLVED

Material portions of pertinent treaty and statutory provisions are included in the Appendix at 54a, *et seq.*

STATEMENT OF THE CASE

A. The Factual Background

In July 1975, the Mescalero Apache Tribe opened the Inn of the Mountain Gods located on the Mescalero Apache Indian Reservation in south central New Mexico. The Inn of the Mountain Gods is a deluxe, tourist resort featuring a luxury hotel, a stocked lake for fishing, boating, and water sports, a golf course, pro shop, tennis facilities, swimming pool, trap and skeet shooting range, a stable complex, paddle tennis courts, restaurants, liquor lounges, and convention facilities (Respondent's Appendix at 6a-8a). The Inn is operated by the Mescalero Apache Tribe as part of a tourism program established by the Tribe to attract non-Indians to the Reservation as well as to the Sierra Blanca Ski Resort, a tribal commercial enterprise located adjacent to the Reservation. In connection with the operation of the Inn of the Mountain Gods, the Mescalero Apache Tribe also maintains a hunting and fishing business, including "package" hunts of big game animals, and a camping and picnicking program. "Package" hunts of big game animals include hunting fees, lodging at the Inn, guide service, and various other hunter needs (Respondent's Appendix at 9a-10a; Jt. Appendix at 142a-143a). The Inn of the Mountain Gods, as well as the Tribe's hunting and fishing business, caters almost

exclusively to non-Indian patrons from across the country. At least 97 percent of the guests at the Inn of the Mountain Gods, including hunters and anglers, are non-Indians from off the Reservation (Respondent's Appendix at 8a, 39a). Public highways and other state public facilities and services are used by persons hunting and fishing on the Mescalero Apache Reservation (Respondent's Appendix at 39a-40a).

In 1977 the Mescalero Apache Tribe adopted a general hunting and fishing ordinance which states it is applicable to all persons, Indian and non-Indian, who hunt or fish on the Reservation. The ordinance requires non-Indians to purchase a tribal permit, and it establishes seasons and bag limits. The ordinance also declares that "no state license of any kind shall be necessary for any person" with respect to hunting or fishing on the Mescalero Apache Reservation (Respondent's Appendix at 10a-11a). Prior to 1977 the Tribe's hunting brochures stated that all New Mexico hunting regulations apply on the Reservation (Respondent's Appendix at 16a).

Both federal and state agencies have assisted the Tribe's hunting and fishing business. In 1966 and 1967 the National Park Service donated 162 elk to the Tribe. These were shipped into New Mexico pursuant to a permit issued by the New Mexico Game and Fish Department which had encouraged the project (Respondent's Appendix at 14a). A Bureau of Indian Affairs range conservationist makes aerial surveys and pellet group transect studies to estimate deer, elk, antelope and bear populations, and he recommends seasons and bag limits for these species to the Tribal Council (Respondent's Appendix at 11a-12a). The U.S. Fish and Wildlife Service has provided technical assistance respecting management of fish, and has stocked reservation streams and several man-made lakes built with federal funds (Respondent's Appendix at 12a-14a).

The New Mexico Department of Game and Fish has in the past stocked streams on the Reservation and has supplied other assistance including the training of conservation officers at the request of the Tribe (Respondent's Appendix at 13a-14a, 16a). The elk, deer and bear populations in south central New Mexico range freely on and off the Mescalero Apache Reservation throughout the year (Respondent's Appendix at 15a).

Moreover, the State has maintained wildlife conservation programs of long standing in areas surrounding the Reservation (Respondent's Appendix at 19a-22a), and State officers enforced wildlife laws and regulations on the Reservation against nontribal members until 1969 when the Tribe informed the State that its fish and game officers would no longer be welcome on the Reservation without tribal permission (Respondent's Appendix at 29a). Thus, the assertion by the court of appeals that the State is unable to claim that it or its lands played any significant role in the creation and preservation of the reservation wildlife resource is contradicted by the record.

From at least 1971 through the period of this litigation, virtually all of the big game permits authorized by the Mescalero Apache Tribe have been sold (Respondent's Appendix at 35a-36a). The non-Indian demand for big game and package hunts has each year exceeded the number of permits available (Respondent's Appendix at 36a-37a). Revenues from the tribal hunting and fishing program as well as from the operation of the Inn of the Mountain Gods have increased annually over the last several years (Respondent's Appendix at 38a-39a).

B. Proceedings in the Courts Below

On July 7, 1977, the Mescalero Apache Tribe filed an action for declaratory and injunctive relief alleging, *inter alia*, that enforcement of the hunting and fishing laws of the State of New Mexico against hunters and anglers on the Mescalero Apache Reservation, either while they are on the Reservation or after they have departed from the Reservation, infringes on tribal sovereignty, conflicts with the Treaty of July 1, 1852, between the United States and the Apaches, 10 Stat. 979, and with certain other specific federal constitutional and statutory provisions. The complaint urged the District Court to declare that jurisdiction to regulate hunting and fishing on the Reservation is vested in the Tribe and the United States to the complete exclusion of the State of New Mexico.

The District Court determined that the Mescalero Apache Tribe has an inherent right to control hunting and fishing within tribal territory, a right which has been neither abrogated nor surrendered. The District Court found that this right to control rested exclusively with the United States and the Mescalero Apache Tribe because, although Congress could relinquish this authority to the several states, the court found no federal

legislation conferring upon the State of New Mexico authority to regulate on the Mescalero Apache Reservation. The District Court also concluded that the federally approved game and fish ordinances of the Mescalero Apache Tribe and its federally supported game and fish program on the Reservation constituted an "integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation." Appendix at 52a. The District Court enjoined the State of New Mexico from enforcing its hunting and fishing laws "against any person either on the reservation or after they [sic] have left the reservation for acts done on the reservation." Appendix at 35a-36a.

The United States Court of Appeals for the Tenth Circuit affirmed the decision of the District Court, holding that the Mescalero Apache Tribe had "inherent authority" over wildlife within the Reservation that preempted the application of state game and fish laws to any person within its tribal territory; that the application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation had been preempted by federal legislation and treaty stipulation; and that application of state game and fish laws to non-Indians hunting or fishing on the Mescalero Apache Reservation infringed on tribal self-government.

The State of New Mexico filed a petition for writ of certiorari in the Supreme Court of the United States on November 12, 1980, seeking review of the Tenth Circuit's decision. On April 6, 1981, this Court granted the petition, vacated the judgment of the Tenth Circuit, remanded the case to that court for further consideration in light of this Court's decision in *Montana* v. *United States*, 450 U.S. 544 (1981), and awarded costs against the Mescalero Apache Tribe.

On remand, the Tenth Circuit accepted supplemental briefs from the parties and, on April 26, 1982, reinstated its previous decision. The opinion of the court of appeals on remand reiterated that state authority over non-Indian hunting and fishing on the Mescalero Apache Reservation would conflict with the Tribe's "broad power" to control "tribal resources" within the Reservation, and thus would infringe on the tribe's inherent sovereignty.

SUMMARY OF ARGUMENT

1. At the threshold of its decision in this case, the Tenth Circuit made the startling declaration that, in the area of wildlife management, the inherent sovereign authority of the Mescalero Apache Tribe is "so pervasive" that it extends beyond its accustomed and settled roles as a backdrop for interpreting statutes and treaties, *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 165 (1973), and as a foundation for tribal regulation of its members and their internal relations, *United States* v. *Wheeler*, 435 U.S. 313 (1978), and becomes an independent, substantive principle of law extending to nontribal members and having preemptive effect on state regulatory jurisdiction over non-Indians within an Indian reservation.

The Tenth Circuit's extraordinary departure from settled principles in this regard is based upon an historical tribal reliance on wildlife for subsistence and on the "significant interest" the court of appeals said this need gives to the Tribe to control its reservation wildlife resources. The threshold application of tribal sovereignty in this manner by the court of appeals is inconsistent with the limitations on the reach of tribal sovereignty expressed by this Court in *Montana* v. *United States*, 450 U.S. 544 (1981), and inverts the analytical framework this Court has constructed for examining whether tribal authority extends to on-reservation activities by non-Indians and, if so, whether tribal authority is exclusive of state regulatory jurisdiction under the tests enunciated in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and *Williams* v. *Lee*, 358 U.S. 217 (1959). The decision of the Tenth Circuit leaves no room for an analysis of the relevant state and tribal interests in asserting jurisdiction over non-Indian hunting and fishing on the Mescalero Apache Reservation. Moreover, the threshold formulation of the court of appeals concerning inherent tribal sovereignty in the area of wildlife regulation distorted its "particularized inquiry" of the nature of the state, federal and tribal interests at stake.

2. States possess a special interest in fish and wildlife found within their borders, *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 386-387 (1978), and it has been the traditional assumption that state wildlife conservation laws

apply to tribal nonmembers on an Indian reservation. The state interest is such that, even on federally owned lands, Congress specifically recognizes the primary authority and responsibility of the states to protect and manage fish and resident wildlife, *e.g.*, § 302(b), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b), and a state may regulate even Indian treaty rights if necessary to preserve a species of wildlife within the state. *Washington Game Dept.* v. *Puyallup Tribe,* 414 U.S. 44 (1973). Except where a species of fish or wildlife is threatened, therefore, a tribe has the right to hunt or fish on the reservation free of state regulation but, contrary to the court of appeals determination, the tribal right does not constitute inherent authority over wildlife which ousts concurrent state jurisdiction over nonmembers. Similarly, state jurisdiction is not preempted by the Treaty of July 1, 1852, for that treaty does not establish exclusive federal jurisdiction over the Mescalero Reservation. Nor is the New Mexico Enabling Act, which disclaims proprietary interest in Indian lands, a disclaimer of governmental control over nonmembers. The Indian Reorganization Act of 1934, 25 U.S.C. § 476, was also held preemptive, as were tribal ordinances concerning hunting and fishing enacted pursuant thereto. But these determinations by the Tenth Circuit squarely conflict with *Washington* v. *Confederated Tribes,* 447 U.S. 134 (1980) and *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978). The Tenth Circuit also discovered preemption in the federal assistance extended to the Tribe which included technical assistance, stocking of reservation lakes, and a transplant of elk from a national park in Wyoming. But pervasive federal regulation was not present, as in *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980), and the federal involvement was well below that described in *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145 (1973), which itself was held not to preempt a state taxing measure. Finally, the analysis of the Tenth Circuit in finding preemption in "negative inferences from Public Law 280," 18 U.S.C. § 1162(b), depends entirely on assuming that exclusive tribal authority exists over wildlife but that is the point to be proved.

3. The tribal right to hunt and fish is an insufficient basis for declaring that tribal authority over nonmember hunting and

fishing is exclusive. Fish and wildlife are not tribal resources like the minerals in *Merrion* v. *Jicarilla Apache Tribe*, ___ U.S. ___, 50 U.S.L.W. 4169 (U.S., Jan. 25, 1982), or like the timber in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), and governmental claims to "ownership" of fish and wildlife are no longer recognized. *E.g.*, *Toomer* v. *Witsell*, 334 U.S. 385 (1948). The tribal right to hunt and fish is inseparably connected with tribal membership and is not transferable. The Tribe thus may not attempt to immunize nonmembers from New Mexico's wildlife conservation laws in order to maximize revenues from its hunting and fishing enterprise both because the Tribe is not entitled as a matter of law to achieve any particular level of revenue from its hunting and fishing enterpise, *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), and because that is not the purpose of the traditional Indian right. The record demonstrates that the Tribe has encountered virtually no difficulty in selling its licenses. Moreover, the Tribe's complaint contained no allegation that the State had abdicated its trust responsibility over wildlife or that more stringent, discriminatory state regulations applied to nonmembers on the Reservation. *Montana* v. *United States*, 450 U.S. 544, 566 n. 16 (1981). Most importantly, state regulation of nonmember hunting and fishing bears no clear relationship to tribal self-government and does not threaten the political or economic security of the Tribe. *Montana* v. *United States*, 450 U.S. at 566.

ARGUMENT

I. The Mescalero Apache Tribe Does Not Have Inherent Authority Over Wildlife Within Its Reservation Which Preempts State Regulation of Non-Indian Hunting or Fishing Within The Reservation

The original opinion of the Tenth Circuit in this case concluded: (1) that state regulation of non-Indian hunting and fishing on the Mescalero Apache Reservation had been preempted by federal legislation and treaty stipulation, and (2) that state regulation of non-Indian hunting and fishing on the

Mescalero Apache Reservation would infringe on the right of tribal self-government.[2]

These conclusions by the court of appeals are a direct and virtually inexorable result from its startling threshold pronouncement that:

> The sovereign powers of the Tribe in wildlife management are so pervasive that sovereignty here moves from a mere backdrop into a leading role on the litigational stage.

Appendix at 16a. Implicit in this statement is the Tenth Circuit's acknowledgement that its decision in this case has elevated tribal sovereignty from its customary and settled role as a "backdrop" against which federal statutes and treaties are to be read in order to determine whether they preempt state authority on Indian land, *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973), to an independent, substantive principle of law which, in the area of wildlife regulation, becomes the controlling consideration and itself may preempt state regulatory authority. Implicit also in the lower court's statement is the recognition that the court has extended the accepted scope of tribal sovereignty beyond tribal members and their internal affairs, *Montana* v. *United States*, 450 U.S. 544 (1981), to include, with respect to reservation hunting and fishing, exclusive regulation of nonmember hunters and anglers. Essentially, the court of appeals has given a novel and enlarged significance to inherent tribal sovereignty in the case of wildlife regulation. According to the decision below, tribal powers are supreme and exclusive of state jurisdiction in this area unless Congress has altered this circumstance by specific delegation of regulatory authority to the states. As the Tenth Circuit explained:

> [R]egulatory powers in Indian country or on Indian lands belong to the Congress except for inherent jurisdiction of the tribes. Congress may delegate this authority to the

[2] On remand, the Tenth Circuit entered a decision which re-instated its original decision and reiterated the conclusion that state authority over non-Indian hunting and fishing on the Mescalero Apache Reservation would conflict with the tribe's "broad power" to control "tribal resources" within the Reservation, and thus would infringe on the tribe's inherent sovereignty.

state, but when it does so it must be in specific terms. *United States* v. *New Mexico,* 590 F.2d 323, 328 (10th Cir. 1978), *cert. denied,* 444 U.S. 832 (1979).

Appendix at 20a. In a footnote to this statement, the Tenth Circuit further observed that: "Insofar as other courts have improperly presumed the existence of state jurisdiction in similar cases, their decisions do not control our determination," naming, in particular, the decision in *United States* v. *Montana,* 604 F.2d 1162 (9th Cir. 1979), *rev'd on other grounds, Montana* v. *United States,* 450 U.S. 544 (1981).

There is simply no support whatsoever in reason or authority to justify or sustain the unique and expanded significance given to the notion of inherent tribal sovereignty by the Tenth Circuit in this case. The lower court's extraordinary departure from settled principles in this regard rests at bottom upon an historical tribal reliance on hunting and fishing for subsistence, and on the "significant interest" the court below said this reliance gives the Tribe in regulating hunting and fishing on the Reservation.

According to the Tenth Circuit, tribal reliance on game and fish for subsistence somehow gave the Mescalero Apache Tribe inherent authority to "completely" control hunting and fishing in the vast territory which its members historically occupied[3] prior to the Treaty of July 1, 1852, between the Tribe and the United States. As the court of appeals explained it:

> The historical relationship between Indian tribes, their lands, and the wild game thereon has of necessity been one of great interdependence. Access to and control of wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *United States* v. *Winans,* 198 U.S. 371, 381 (1905). After a careful, thoughtful analysis, the district court properly determined

[3] According to the testimony of Myra Ellen Jenkins, New Mexico State Historian and Custodian of the Official Archives of the State of New Mexico, who testified as an expert witness with respect to the cultural, social and political history of the Mescalero Apache Tribe, the Mescalero Apache Tribe consisted of various nomadic bands which roamed vast areas of the Southwest including Texas, New Mexico, and the Republic of Mexico. Jt. Appendix at 168a.

> that, before the signing of the Treaty with the Apaches, July 1, 1852, 10 Stat. 979 (1852), the Tribe "had inherent and complete authority to control the fish and game found within the confines of the tribal territory."
>
> * * *
>
> The Tribe's inherent authority stems largely from the traditional reliance on wild game for basic survival needs. See F. Cohen, *Handbook of Federal Indian Law* 286 (1942).

Appendix at 16a-17a. According to the court below, the Mescalero Apache Tribe remained possessed of this inherent right at the time of the execution of its treaty with the United States on July 1, 1852, and the Tribe maintained its right of inherent control over hunting and fishing in this vast region after the Treaty of July 1, 1852, because, in the judgment of the court of appeals, a treaty is "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," citing *United States* v. *Winans,* 198 U.S. at 381. Since the Mescalero Apache Tribe had not expressly relinquished in the 1852 treaty its previously acquired right of "complete" control over fish and game in this vast area, this tribal right continued after the execution of the treaty. Indeed, the tribal right to control wildlife thereby became, according to the court of appeals, a treaty-sanctioned, legal right which has not since been abrogated.

> [T]he Tribe retains its authority even though the treaty itself did not fix the boundaries of the tribal reservation. . . . Abrogation of any rights protected by treaty, particularly fundamental hunting and fishing privileges, must be explicit to be effective . . . and no congressional enactment here meets that standard.

Appendix at 17a. According to the Tenth Circuit, the Mescalero Apache Tribe continued to enjoy its previously acquired and unrelinquished inherent authority to exclusively control hunting and fishing in the vast region which its members occupied until the Mescalero Apache Reservation was created by Presidential Executive Order in 1873. Upon the creation of the Mescalero Apache Reservation, the tribal right to exclusive

control of hunting and fishing continued, but it was now, presumably, limited to the confines of the Reservation.

Finally, the court of appeals concluded that the inherent sovereignty which the Mescalero Apache Tribe had thus acquired and now retained as a treaty-recognized power, together with the territorial authority it possessed with respect to its Reservation, gave the tribe a "significant interest" in regulating reservation wildlife, on which it had historically relied for subsistence, that preempts state regulation of even nonmember hunting and fishing on the Reservation at the invitation of the Tribe. In this regard, the court below stated, "[W]e presume, when Indian tribes under federal protection seek to regulate *their traditional interests*, that federal law has preempted state jurisdiction." Appendix at 20a.

There is no dispute in this case that the Mescalero Apache Tribe relied on wildlife for subsistence and that tribal members freely took fish and game in ancestral territory. Nor is there any dispute that the tribal right to hunt and fish survived the Treaty of July 1, 1852, even though it was silent on the subject. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968). Nor is there any quarrel that the tribal right to take fish and game within its reservation is exclusive if the tribe elects to exercise its unquestioned authority to exclude nonmembers from sharing in this activity. See *Merrion* v. *Jicarilla Apache Tribe*, ____ U.S. ____, 50 U.S.L.W. 4169 (1982). These are the only rights which the Mescalero Apache Tribe may claim by history or treaty.

The quarrel in this case is with the conclusion of the Tenth Circuit that the traditional tribal reliance on hunting and fishing for subsistence, together with the Tribe's governmental authority within its Reservation, confers upon the Tribe the right to exclusive regulation of reservation hunting and fishing by nonmembers invited by the Tribe to share in its otherwise exclusive privilege. The conclusion of the court of appeals is inconsistent with the scope of tribal sovereignty established by this Court in *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), and *United States* v. *Wheeler*, 435 U.S. 313 (1978). It is for this reason, as well as those addressed later in this brief,

that the decision of the Tenth Circuit was previously vacated by this Court and remanded for further consideration in light of this Court's decision in *Montana* v. *United States, supra.* The remand was occasioned, at least in part, because the unique and enlarged significance given to the notion of inherent tribal sovereignty by the Tenth Circuit was irreconciliable with the limited application given to that notion in *Montana* and because the decision below offered no sound reason to warrant a departure, in the area of wildlife regulation, from the limited scope otherwise afforded tribal sovereignty.

On remand, however, the Tenth Circuit simply reinstated its previous decision and dismissed this Court's decision in *Montana* as irrelevant to the proceeding. The Tenth Circuit dispensed with *Montana* by making the superficial observation that *Montana* dealt with the power of an Indian tribe "to regulate fishing and hunting by non-Indians on lands within its reservation owned in fee simple by non-Indians," while the instant case involves the power of a state to regulate non-Indian hunting and fishing on reservation trust lands. Appendix at 6a.

In doing so, the Tenth Circuit failed to recognize and apply the underlying principles enunciated in *Montana* where this Court reiterated the principle that Indian tribes retain the inherent power over relations among members of a tribe but that the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes" and cannot survive absent an express congressional delegation. 450 U.S. at 564. See *United States* v. *Wheeler,* 435 U.S. 313 (1978).

This Court applied that principle in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191 (1978), and rejected the assertion of inherent tribal sovereignty to exercise criminal jurisdiction over non-tribal members. Such application of tribal power would be inconsistent with the diminished scope of their sovereign authority. In the *Montana* decision, this Court extended the limitations on the reach of tribal sovereignty established in *Wheeler* and applied to criminal jurisdiction in *Oliphant* by explaining that:

> Though *Oliphant* only determined inherent tribal authority in criminal matters, the principles on which it relied

> support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of non-members of the tribe.

450 U.S. at 565. This "general proposition" is applicable without exception to all lands within an Indian reservation, including both non-Indian fee lands and Indian trust lands. See *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. at 193, n. 1. Thus, contrary to the Tenth Circuit's superficial observation, the factual difference between the *Montana* case and this case is inconsequential.

The court below simply failed properly to apply in the instant action this "general proposition" of no inherent tribal power over nonmembers. Indeed, proper application of the "general proposition" in this case would have resulted in a threshold determination that the inherent sovereign powers of the Mescalero Apache Tribe do not extend to non-Indian hunting and fishing within the Mescalero Apache Reservation, regardless of whether reservation trust lands or non-Indian fee lands are involved. State regulatory authority over such nonmember hunting and fishing, on the other hand, should have been acknowledged, at least at the threshold of the Tenth Circuit's decision in this action. *See, e.g., United States* v. *McBratney*, 104 U.S. 621 (1882); *Draper* v. *United States*, 164 U.S. 240 (1896); *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946).

In its decision in this case, however, the Tenth Circuit completely reversed this "general proposition" and concluded instead, based simply upon historic tribal reliance on hunting and fishing for subsistence and on the tribal right to hunt and fish freely on ancestral lands, that the inherent sovereign powers of the Mescalero Apache Tribe do indeed extend to the regulation of nonmember hunting and fish on the Mescalero Apache Reservation. This erroneous initial presumption fostered, in turn, the misperception that, with respect to nonmember activity on the reservation, tribal regulatory authority, to the complete exclusion of state regulation, is the rule, and state regulation the exception. According to the court below, the burden is on a state to establish that tribal regulatory authority over non-Indian hunting and fishing has been relinquished or

abrogated and that state regulatory authority has been ordained by federal delegation. In this regard, the court below relied on its decision in *United States* v. *New Mexico,* 590 F.2d 323 (10th Cir. 1978), *cert. denied,* 444 U.S. 832 (1979), and observed that regulatory powers within an Indian reservation belonged solely to the Congress and the resident Indian tribe, unless Congress has specifically delegated regulatory jurisdiction to the states. Appendix at 20a. Thus, the Tenth Circuit not only inverted the "general proposition" enunciated by this Court in *Montana* v. *United States,* it also concluded that the authority of the Mescalero Apache Tribe to regulate hunting and fishing within its Reservation was exclusive of concurrent state jurisdiction.

The original decision of the Tenth Circuit in this case thus completely misperceived the "source and scope" of both state and tribal power to regulate non-Indian hunting and fishing within tribal territory, which *Montana* had made clear.

To be sure, this Court in *Montana* recognized that there are some instances in which an Indian tribe retains inherent sovereign authority to regulate the activities of nonmembers on its reservation. In this regard, this Court said:

> . . . Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealing, contract, leases, or other arrangements.

450 U.S. at 565. Nevertheless, even in those instances in which an Indian tribe is found to have inherent authority to regulate nonmember activity, this Court did not suggest that such authority is exclusive. On the contrary, this tribal authority is, in most instances, to be exercised concurrently with state regulatory jurisdiction. *United States* v. *Montana,* 604 F.2d 1162 (9th Cir. 1979).[4]

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[4] The decision of this Court in Montana v. United States left standing the ruling of the United States Court of Appeals for the Ninth Circuit that the State of Montana has concurrent jurisdiction with the Crow Tribe to regulate hunting and fishing by nonmembers of the Tribe on trust lands within the Crow reservation. The Ninth Circuit ruling was based essentially upon the "general proposition" approved by this Court on review, but the Tenth Circuit expressly disregarded the Ninth Circuit ruling as "improper." Appendix at 21a, n. 12.

Contrary to the lower court's formulation, a state's customary jurisdiction over non-Indians engaged in activities within an Indian reservation, whether on Indian trust lands or non-Indian fee lands, is not ousted unless a specific application of state law is preempted by federal law or would violate a tribe's right of self-government. *White Mountain Apache Tribe* v. *Bracker,* 448 U.S. 136 (1980); *Washington* v. *Confederated Tribes,* 447 U.S. 134 (1980); *White Mountain Apache Tribe* v. *Arizona,* 649 F.2d 1274 (9th Cir. 1981). Whether a specific application of state law is preempted by federal law requires:

> [A] particularized inquiry into the nature of the state, federal, and tribal interest at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

White Mountain Apache Tribe v. *Bracker,* 448 U.S. at 145. If no federal preemption is manifested by this process, the inquiry then turns to the question of actual infringement of tribal self-government. Thus, state law will be held inapplicable, even if not preempted by Congress, if it infringes upon the internal affairs of an Indian tribe. A finding of either federal preemption or infringement on Indian sovereignty is then a conclusion which results from applying this dual analysis, as this Court's decision in *Montana* v. *United States* clearly confirmed. The fundamental problem with the decision of the Tenth Circuit in this case is that the court left no room for a proper analysis of whether tribal authority extends to non-Indian hunting and fishing on the Mescalero Apache Reservation and, if so, whether it is exclusive of state regulatory authority under the tests enunciated by this Court in *Bracker* and *Williams* v. *Lee,* 358 U.S. 217 (1959). Instead, the Tenth Circuit relied upon its unprecedented determination that traditional tribal reliance on hunting and fishing for subsistence in ancestral lands was a sufficient basis to extend inherent tribal sovereignty to nonmember hunting and fishing within the Mescalero Apache Reservation to the complete exclusion of concurrent state authority. In doing so, the decision of the Tenth Circuit in this case is squarely in conflict with the decision of this Court in *Montana* v. *United States,* and it should be reversed.

To be sure, the Tenth Circuit did not alone rely on its novel formulation of exclusive inherent tribal sovereignty in the area of wildlife regulation to reach its decision in this case. In this regard, the court noted: "As important as sovereignty is in this case, we need not consider whether the tribe's sovereign powers alone are sufficient to preempt state jurisdiction." Appendix at 21a. The court found, in addition, federal preemption in the Treaty of July 1, 1852, and selected federal statutory provisions. As will be seen later in this argument, however, the court's analysis of these treaty and statutory provisions was so distorted by its threshold formulation as to the extraordinary role inherent tribal sovereignty plays in wildlife regulation, that it fell far short of the particularized inquiry as to the nature of the state, federal, and tribal interests at stake which this Court directed to be undertaken in *Bracker*. On the contrary, scant attention was given to the state's regulatory interest.

Moreover, the lower court's companion determination that application of state game and fish laws to nonmembers hunting and fishing on the Mescalero Apache Reservation infringed on self-government was likewise skewed by the extraordinary importance given by the court to inherent tribal sovereignty in the area of wildlife regulation. This is evident from the court's observation that:

> [T]he state, therefore, cannot interfere by attempting to control non-Indian hunting and fishing conducted exclusively on reservation land held by the tribe any more than it could do so if the activities in question took place in one of New Mexico's neighboring states.

Appendix at 6a. This statement reveals in dramatic fashion the perspective underlying the Tenth Circuit's decision in this case. Essentially, as the court below views it, the Mescalero Apache Reservation is, in fact, a sovereign authority on "equal footing" with the state of New Mexico and its sister states. This view is simply not the law as the ensuing arguments will establish.

II. The Court of Appeals Erred In Holding That Application of New Mexico's Wildlife Conservation Laws to Nonmembers on the Mescalero Reservation Has Been Preempted by Treaty and Federal Statutes

On remand from this Court "for further consideration in light of *Montana* v. *United States,*" 450 U. S. 1036 (1981), the court of appeals was of the view that the principles of *Merrion* v. *Jicarilla Apache Tribe,* ____ U.S. ____, 50 U.S.L.W. 4196 (1982), govern rather than those of *Montana.* The opinion of the court of appeals on remand deals with inherent tribal sovereignty, not with preemption, and finds support in *Merrion* for the "broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands." Appendix at 6a. Distinguishing *Montana* as inapplicable, the court of appeals stated, "The Court's decision in *Merrion* v. *Jicarilla* convinces us that *Montana* v. *United States* does not dictate a result different from that originally reached by this court in *Mescalero* v. *New Mexico.*" Appendix at 5a. With that, the Tenth Circuit affirmed the judgment of the district court and ordered that its previous decision be reinstated. Appendix at 7a.

The assertion of state regulatory authority[5] for activities on Indian reservations is permissible unless exercise of such authority has been preempted by federal law or unless it infringes on the right of reservation Indians to make their own laws and be ruled by them. *White Mountain Apache Tribe* v. *Bracker,* 448 U. S. 136, 142 (1980). The Court in *Bracker* stated that both treaties and statutes must be examined "in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence." 448 U. S. at 144-145. Mechanical conceptions of state or tribal sovereignty do not control and the

[5] This case involves application of state regulatory authority not state taxing authority. The New Mexico laws here involved are laws and regulations requiring purchase of hunting and fishing licenses as well as substantive conservation regulations relating to seasons, bag limits, and means and methods of harvest of fish and game. Both the licensure requirements and the substantive regulations are referred to hereafter as "state wildlife conservation laws," which is intended to encompass regulations relating to both fish and wildlife.

endeavor should involve a particularized inquiry into the nature of the state, federal, and tribal interests at stake.

While treaties and statutes are thus to be read against a backdrop of Indian sovereignty in determining whether state power is preempted, the Tenth Circuit's analysis begins from the assumption of "broad power of the Tribe to control, exploit, and regulate tribal resources on tribal lands." Appendix at 6a. Under the court's analysis, sovereign powers of the Tribe in wildlife management are so pervasive that "sovereignty moves from a mere backdrop into a leading role on the litigational stage." Appendix at 6a.[6] Building on this assumption, the analysis of the court of appeals then "presumes" that federal law has preempted state jurisdiction "when Indian tribes under federal protection seek to regulate *their traditional interests.*" Appendix at 20a. Petitioner submits that the Tenth Circuit analysis is precisely the type of absolutist approach that *Bracker* sought to limit and provides no scope for consideration of the state interests involved. More than that, petitioner disputes the notion that tribes possess inherent powers of such breadth over reservation wildlife that regulation by a tribe preempts state jurisdiction. The court examined the treaty and several statutes and, in light of its notions of inherent tribal powers over reservation land and wildlife, the court had no difficulty in discovering at least six sources of preemption. We discuss these sources *seriatim* but we turn first to the traditional assumptions which relate to the precise issue here.

A. Applicability of State Wildlife Conservation Laws to Nontribal Members on a Reservation Has Been the Traditional Assumption

The court of appeals finds in the Tribe a broad power to exploit reservation wildlife which does not in fact exist. While this inherent power of the Tribe is variously referred to by the

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[6] Judge McKay's views on territorial integrity of the Mescalero Apache Reservation are set forth in detail in his dissent in the *en banc* decision of the Tenth Circuit in Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967, 986-987 (10th Cir.1980), cert. denied, 450 U.S. 959 (1981).

court below as "sovereign powers in wildlife management," "game control powers," "control of wildlife," and "broad power of the Tribe to control, exploit, and regulate tribal resources," Appendix at 16a, 17a, 17a, 6a, the fact is that what the Mescalero Tribe enjoys is not the right to control or manage wildlife but the right to hunt or fish on the Reservation free of state regulation. The court's handling of *United States* v. *Winans*, 198 U.S. 371 (1905), points up the distinction. *Winans* is cited by the Tenth Circuit for the proposition that access to *and control of* wildlife was "not much less necessary to the existence of the Indians than the atmosphere they breathed." Appendix at 16a. But, what *Winans* actually said is that "the right to resort to the fishing places" in controversy was not much less necessary than breathing. 198 U.S. at 381. The Yakima Indians in *Winans* had a right to fish at the usual and accustomed stations and grounds but not "control of wildlife."[7] The assumption by the court of appeals that the right to hunt and fish free of state law equates with sovereign power to manage wildlife is not supported by authority and involves a significant gap in sequence. In fact, it is erroneous.

By contrast, both on the larger issue of application of state criminal laws to nontribal members and the narrower question of application of state wildlife conservation laws on a reservation, the traditional assumption has been that state law applies. *United States* v. *McBratney*, 104 U.S. 621 (1882), established that a state has criminal jurisdiction over its own citizens and other nontribal members for acts committed on a reservation against non-Indians unless upon admission Congress had intended to except out the reservation or retain to the United States sole and exclusive jurisdiction over the reservation. Following *McBratney*, the Court in *Draper* v. *United States*, 164 U.S. 240 (1896), again upheld state criminal jurisdiction, said to result "from the very nature of the equality conferred on the

[7] Indeed, it is held that treaties with tribes of the Pacific Northwest which expressly reserve the fishing right, and which have spawned such a considerable amount of litigation, establish no absolute right to any particular level of fish supply. United States v. Washington, No 81-3111 (9th Cir., filed November 3, 1982), reversing in part, 506 F. Supp. 187 (W.D. Wash. 1980).

state by virtue of its admission into the Union." 164 U.S. at 243. See also *New York ex rel. Ray* v. *Martin*, 326 U.S. 496 (1946). Thus the *McBratney* line of cases, based on the equal footing doctrine, holds that jurisdiction over offenses committed by non-Indians against other non-Indians on an Indian reservation lies exclusively in the states and not in the federal courts.[8]

On the narrower question of applicability of state wildlife conservation laws, state authority to regulate nonmember hunting and fishing was, prior to the Cherokee Fishing Case in 1976,[9] uniformly recognized by courts, the Interior Department, and state Attorneys General. *White Earth Band of Chippewa Indians* v. *Alexander*, 683 F.2d 1129 (8th Cir. 1982); *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981); *United States* v. *Montana*, 604 F.2d 1162 (9th Cir. 1979), rev'd on other grounds, 450 U.S. 544 (1981); *United States* v. *Sanford*, 547 F.2d 1085 (9th Cir. 1976); *California* v. *Quechan Tribe*, 424 F.Supp. 969 (S.D. Calif. 1977), rev'd on other grounds, 595 F.2d 1153 (9th Cir. 1979); *Montana ex rel. Nepstad* v. *Danielson*, 149 Mont. 438, 427 P.2d 689 (1967); *Ex Parte Crosby*, 149 Pac. 989 (Nev. 1915); 78 I.D. 101 (1971);[10] 1960-1962 Opinions of the Attorney General of Oregon 11; 1953-1954 Report of the Attorney General of New Mexico 511; 1950-1952 Opinions of the Attorney General of Nevada 20.

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[8] The Handbook of Federal Indian Law (1958 ed.), published by the Department of the Interior, states at 513: "We have already noted the general rule that the Indian country within a State ordinarily is not regarded as an area of exclusive Federal jurisdiction but is politically and governmentally a part of the State in which State laws apply to the extent that they do not conflict with Federal Indian law."

[9] Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n, 588 F.2d 75 (4th Cir. 1978), petition for writ of certiorari voluntarily dismissed, 446 U.S. 960 (1980).

[10] The Solicitor of the Department of the Interior in 1971 issued a formal opinion advising that nontribal members are subject to state game laws on an Indian reservation. During 1976 the Solicitor's opinion was withdrawn without explanation.

There are two other traditions, also of long standing, which are relevant to the issue before the Court. The first of these is the special interest of the states in fish and wildlife, animals *ferae naturae*, found within their borders. While we now speak of the right to regulate, earlier cases referred to state "ownership" of wildlife, the ownership concept being described by Justice Frankfurter as "the symbol of one of the weightiest doctrines in our law," *Toomer* v. *Witsell*, 334 U.S. 385, 402 (1948) (concurring opinion), around which had clustered a voluminous body of rulings. States have broad trustee and police powers in respect of wildlife, *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976), and the ownership or title language in the 19th-century cases, while now recognized as a legal fiction, nevertheless was an expression of "the importance to its people that a State have power to preserve and regulate the exploitation of an important resource." *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977), citing *Toomer* v. *Witsell*, 334 U.S. at 402.

As indicated by the Court in *Kleppe* v. *New Mexico*, *supra*, the authority of a state over fish and wildlife rests on a dual basis: trustee and police powers. The two bases import distinct notions. Police power *allows* the state to exercise authority to protect public health, safety and welfare while trusteeship implies obligation and responsibility, comparable to that of a fiduciary, and *requires* the state to exercise its public trust in a manner designed to promote the common benefit of present and future generations of its people. *New York ex rel. Silz* v. *Hesterberg*, 211 U.S. 31, 41 (1908); *New Jersey Department of Environmental Protection* v. *Jersey Central Power & Light*, 125 N.J. Super. 97, 308 A.2d 671 (1973); *Maryland Department of Natural Resources* v. *Amerada Hess Corp.*, 350 F.Supp. 1060 (D. Md. 1972); *Hayes* v. *Bowman*, 91 So. 2d 795, 799 (Fla. 1957). See Sax, The Public Trust Doctrine, 68 Mich.L.Rev. 471, 477 (1969-1970). In sum, while state authority must be exercised within constitutional restraints, and while state control over wildlife does not preclude the proper exercise of federal power, states have a special interest in regulating and preserving wildlife for the benefit of their people. *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 386, 392 (1978) (concurring opinion of Burger, Ch. J.).

A second tradition, related to the first, is the pervasive policy of Congress in expressly declaring that state wildlife conservation laws are applicable on federal lands. Thus state laws affecting fish and wildlife are expressly declared by Congress to be applicable on over 400 million acres of public domain land administered by the Bureau of Land Management;[11] on over 250 million acres of national forest administered by the Forest Service;[12] on national recreation areas administered by the National Park Service and by the Forest Service;[13] on military reservations;[14] on lands administered by NASA and the Department of Energy (formerly AEC lands);[15] on national wildlife refuges administered by the Fish and Wildlife Service;[16] and on Wild and Scenic Rivers.[17] Congress has traditionally deferred to the special interest of the states in the protection and management of fish and resident wildlife and, on the few occasions when it has chosen to preempt primary state responsibility, Congress has done so self-consciously and precisely, as in section 6(f) of the Endangered

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[11] § 302(b), Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b).

[12] Ibid.

[13] E.g., 16 U.S.C. § 460n-4 (Lake Mead NRA); 16 U.S.C. § 460o-5 (Delaware Water Gap NRA); 16 U.S.C. § 460p-5 (Spruce Knob-Seneca Rocks NRA); 16 U.S.C. § 460q-4 (Whiskeytown-Shasta NRA); 16 U.S.C. § 460r-5 (Mt. Rogers NRA); 16 U.S.C. § 460v-3 (Flaming Gorge NRA); 16 U.S.C. § 460x-4 (Sleeping Bear Dunes National Lakeshore); 16 U.S.C. § 460z-7 (Oregon Dunes NRA); 16 U.S.C. § 460aa-7 (Sawtooth NRA); 16 U.S.C. § 460dd-4 (Glen Canyon NRA); 16 U.S.C. § 460gg-9 (Hells Canyon NRA).

[14] Engle Act, 72 Stat. 29 (1958), 10 U.S.C. § 2671.

[15] § 2, Sikes Act, 88 Stat. 1373, 16 U.S.C. § 670k.

[16] § 4(c), National Wildlife Refuge System Administration Act, 80 Stat. 927, 16 U.S.C. § 668dd(c).

[17] § 13(a), Wild and Scenic Rivers Act, 82 Stat. 917, 16 U.S.C. § 1284(a).

Species Act of 1973, 16 U.S.C. § 1535(f).[18] Even then, Congress has not completely ousted state authority which instead remains concurrent or residual as in the Endangered Species Act, 16 U.S.C. § 1535(f), and the Migratory Bird Treaty Act, 16 U.S.C. § 708. Annual migratory waterfowl hunting regulation thus involves the establishment of federal framework regulations within which a state may impose such stricter regulations as it chooses. Cf. *Carey* v. *South Dakota*, 250 U.S. 118 (1919). With this sketch of the traditional assumptions, we now address the court of appeals conclusion that state law is preempted by treaty and statute.

B. The Treaty Stipulations and Federal Statutory Provisions Are Not Preemptive of State Law

The court below determined that, as important as tribal sovereignty is in the case, it need not consider whether the Tribe's sovereign powers alone are sufficient to preempt state jurisdiction. Appendix at 21a. The court thereupon reviewed the Treaty of July 1, 1852 and several congressional enactments and concluded that each preempted application of New Mexico's wildlife conservation laws to nonmembers on the Reservation. We examine in turn each of these sources of preemption.

(1) *Treaty of July 1, 1852.* By emphasizing particular words in Articles 1 and 9 of the Treaty of July 1, 1852, the Tenth Circuit found the Treaty to be an "expression of federal dominance on the reservation" which completely preempted

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[18] The importance to Congress of state management of fish and wildlife is set forth in the report of the House Committee on Merchant Marine and Fisheries on the bill that was subsequently enacted as the Endangered Species Act of 1973:

> [T]he states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government. It is true, and indeed desirable, that there are more fish and game enforcement agents in the state system than in the Federal government.

H.Rep. No. 93-412, 93d Cong., 1st Sess. 7 (1973). And see Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1247-50 (D.C. Cir. 1980).

the application of state law even to non-Indians on the Reservation. Appendix at 21a. The full text of these provisions, Appendix at 54a, does not, however, sustain the interpretation of the court below. Read in full, these treaty provisions mean only that the Tribe and its members recognized the sovereignty of the United States against which they had previously waged war, and that the United States would, in turn, provide a place for the Tribe to live. The meaning and significance accorded these treaty stipulations by the court below is not only at variance with the full text, it is also inconsistent with the decision *en banc* of the Tenth Circuit in *Mescalero Apache Tribe* v. *O'Cheskey*, 625 F. 2d 967 (10th Cir. 1980, *cert. denied*, 450 U.S. 959 (1981), *reh. denied*, 102 S.Ct. 1296 (1982). And see *United States* v. *Montana*, 604 F. 2d 1162 (9th Cir. 1979), rev'd on other grounds, 450 U.S. 544 (1981). In *Mescalero Apache Tribe* v. *O'Cheskey*, over the dissenting opinions of Judges Doyle and McKay, the Treaty of July 1, 1852, was construed by the court not to preempt application of New Mexico's gross receipts tax to non-Indians doing business with the Tribe on the Reservation. The court in *O'Cheskey* states:

> [The Treaty] was an agreement entered into with *some* Apaches, including some Mescaleros, and was ratified by Congress.... It was a treaty of "peace and friendship." As this was all it purported to be, it established no rights generally for either party nor any rights in land. See *Choate* v. *Trapp*, 224 U.S. 665.... The Mescaleros were then under the complete sovereignty of the United States.

624 F.2d at 971. The court below failed to explain why the so-called "federal dominance" expressed in the treaty preempts state game and fish laws in this case but not the gross receipts tax in *O'Cheskey*. In *United States* v. *Montana*, the Ninth Circuit dealt with the Treaty of 1851 with the Crow Tribe, which contains provisions similar to those involved here, and did not deem that treaty to preempt application of state laws to non-Indians hunting and fishing on the Crow Reservation. Petitioner submits that the lower court strains the language of the treaty beyond the limits of credible analysis.

(2) *The New Mexico Enabling Act.* The court below concluded that the Enabling Act for New Mexico, 36 Stat. 557 (1910), which places Indian lands in New Mexico "under the absolute jurisdiction and control of the Congress of the United States," taken in conjunction with the "exclusivity" language of the Treaty of July 1, 1852, preempts state law. The court stated: "In the area of resource management, the treaty language in this case suggests that 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." Appendix at 22a.

As we have said above, there is simply no "exclusivity" language in the Treaty of July 1, 1852. Moreover, the decision of the court below is contrary to a line of cases starting with *Draper* v. *United States,* 164 U.S. 240 (1896), and extending through *Organized Village of Kake* v. *Egan,* 369 U.S. 60 (1961), to *Mescalero Apache Tribe* v. *Jones,* 411 U.S. 145, 148 (1973) where this Court rejected "the broad assertion that the Federal Government has exclusive jurisdiction over the Tribe for all purposes and that the State is therefore prohibited from enforcing its revenue laws against any tribal enterprise" on or off tribal land. Nor can the court's ruling on the New Mexico Enabling Act be squared with Tenth Circuit decisions in *Mescalero Apache Tribe* v. *O'Cheskey, supra,* and *Jicarilla Apache Tribe* v. *United States,* 601 F.2d 1116 (10th Cir. 1979), simply by the device of saying that in the area of resource management "the treaty language suggests that 'absolute' jurisdiction is indeed 'exclusive' jurisdiction." Appendix at 22a. Unless this point is being assumed in consequence of the court's notions of inherent powers over wildlife, this is the very point to be proved.

In *Jicarilla Apache Tribe* v. *United States, supra,* the Tenth Circuit itself rejected the notion that the New Mexico Enabling Act established Indian reservations as exclusive federal jurisdictional enclaves, stating:

> By 1910, the date of the enactment of New Mexico's Enabling Act, both the Congress and the United States Supreme Court had established a procedure whereby Indian reservations might be created as exclusive federal enclaves within states and territories similar to military reservations created under the Arsenals and Dockyards Clause (U.S. Const. Art. I, § 8, Cl. 17). This procedure

> was followed exclusively only with respect to the Kansas Indians. A different procedure was followed with respect to the grant of New Mexico's statehood. In any event, today there is no exclusive federal jurisdictional Indian Reservation in the United States.

601 F.2d at 1129. See also *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981). In *White Mountain Apache*, the Ninth Circuit concluded:

> Arizona's disclaimer does not preclude it from imposing a license fee on non-Indians hunting and fishing on a reservation, even though such a fee is related to reservation realty. A state license fee is not a property tax or a tax paid by "nonmembers of the Tribes," *id.*, and has only an indirect effect on the tribal treasury.

649 F.2d at 1280. The court below apparently interpreted the Enabling Act in light of the court's assumption that the Tribe possesses inherent authority over wildlife but that assumption is unwarranted and so also is its reading of the New Mexico Enabling Act.[19]

(3) *Indian Reorganization Act of 1934.* The Tenth Circuit also inferred preemption of state authority over non-Indian hunting and fishing from the language of the Indian Reorganization Act of 1934 which "reconfirms" in Indian tribes organizing under the Act "all powers vested in any Indian tribe . . . by existing law." The court below reasoned that tribal power over reservation hunting and fishing was "unquestionably vested" prior to 1934, and thus its "reconfirmation" in the Indian Reorganization Act gave that Act itself preemptive effect. The court further observed that tribal ordinances regarding hunting and fishing on the reservation enacted pursuant to the Indian Reorganization Act may themselves serve to preempt state law on the reservation.

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[19] Questions relating to the meaning and application of Montana's and Arizona's Enabling Acts, in the context of state court adjudication of Indian water rights, are now pending before this Court in Northern Cheyenne Tribe v. Adsit, 668 F.2d 1080 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3217 (October 8, 1982), and San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), cert. granted, 51 U.S.L.W. 3217 (October 8, 1982).

But there is no intent whatsoever in the Indian Reorganization Act to delegate to tribes authority to preempt state regulations otherwise applicable to nonmembers. In *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191 (1978), it was urged that the Reorganization Act confirmed tribal criminal jurisdiction over nonmembers but this Court stated that the Act merely gives each Indian tribe the right to organize for its common welfare and adopt an appropriate constitution and by-laws. And, in the *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), the *Colville Cigarette* case, the Court flatly refused to infer from the fact that tribes exercise congressionally sanctioned powers of self-government that Congress "has thereby delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe." 447 U.S. at 156. And see *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d at 1281. The court below cites footnote ten of *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 143 (1980) for its own proposition that the Reorganization Act "reconfirms all preexisting powers of the Tribe and itself becomes a source of preempting power," Appendix at 23a, but the *Bracker* reliance is simply misplaced as a reading of the *dicta* of the cited footnote demonstrates.

(4) *Federal Developmental Assistance.* The court below also found preemption of state law in the federal assistance provided to the Mescalero Apache Tribe by the Department of the Interior in the development of a tribal hunting and fishing enterprise. This conclusion on the part of the court likewise conflicts with decisions of this Court and with at least one other decision of the Tenth Circuit itself.

The federal assistance which the court below considered to be preemptive of state law was a donation of elk, fish stocking of reservation lakes, technical assistance on fish management, and aerial surveys and animal pellet studies by a Bureau of Indian Affairs range conservationist to assess wildlife populations. This finding, that occasional federal assistance to the Tribe preempts the application of state law to non-Indian hunters and anglers on the Reservation is wholly inconsistent with the preemption standard expressed by this Court in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980). In

Bracker, this Court declared that congressional enactments and comprehensive implementing regulations establishing a pervasive federal regulatory scheme (as opposed to material and technical assistance) must be involved in order to oust state law from application on an Indian reservation. Indeed, as explained in *Bracker:*

> Our decision today is based on the preemptive effect of the comprehensive federal regulatory scheme, which, like that in *Warren Trading Post Company* v. *Arizona Tax Commission*, *supra*, leaves no room for the additional burdens sought to be imposed by state laws.

448 U.S. at 151, n. 15. In *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973), federal involvement in an Indian commercial enterprise was found not to preempt the application of state law to the tribal activity. In that case, the Bureau of Indian Affairs had conducted a feasibility study, and had provided equipment and construction money by a loan from the federal government. The necessary land was supplied by the Forest Service on a long-term lease to the tribe. The degree of federal activity in the instant case falls far below that involved in the *Jones* case.[20] And see *Mescalero Apache Tribe* v. *O'Cheskey*, 625 F.2d at 974 (concurring opinion).

(5) *Public Law 280.* Finally, the court of appeals determined that federal preemption resulted from "the negative inferences from Public Law 280." Appendix at 21a. The court reasoned that because Public Law 280, 18 U.S.C. § 1162(b), protects previously conferred or "traditional" Indian hunting and fishing rights from being hindered in those states which have accepted Public Law 280 jurisdiction, a non-Public Law

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[20] A major aspect of federal assistance to the Mescalero Tribe is a fish hatchery on the Reservation heretofore operated by the U.S. Fish and Wildlife Service which provided fish for stocking the waters of the Mescalero Reservation and other Indian reservations and pueblos in New Mexico and surrounding states. Respondent's Appendix at 12a-13a. During 1982 Congress withdrew funding for operation of the Mescalero hatchery by the Fish and Wildlife Service. The House Committee on Appropriations noted that it had "no objection" to funding of the hatchery by the Bureau of Indian Affairs but the Committee appropriated no additional funds therefor. H.Rep. No. 97-942, 23, 56 (1982).

280 state like New Mexico may not, *a fortiori*, hinder such rights. But, again, this conclusion is based on the Tenth Circuit's assumption that the Treaty of July 1, 1852, afforded the Mescalero Tribe "sovereign power to manage wildlife" for the reason that it did not expressly withdraw such power. In fact, the Treaty of July 1, 1952, afforded no such sovereign power to the Tribe. Public Law 280 would not prohibit New Mexico even if it were a Public Law 280 state from exercising the authority it seeks to exercise in this case. The court's analysis of the preemptive effect of the treaty and statutes is colored by its initial assumption but that assumption is wrong and so also is the Tenth Circuit's analysis of the sources of preemption.

III. State Regulation of Nonmember Hunting and Fishing on the Mescalero Reservation Does Not Infringe on the Right of the Tribe to Make its Own Laws and Be Governed by Them

A. The Tenth Circuit's Finding of Infringement Is Based on a Failure to Properly Evaluate and Balance the State and Tribal Interests at Stake

On remand, the court of appeals determined that principles enunciated in *Merrion* v. *Jicarilla Apache Tribe*, ____ U.S. ____, 50 U.S.L.W. 4196 (1982) rather than those of *Montana* govern. Appendix at 7a. Pointing to language in *Merrion* that tribal authority to tax "derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services," Appendix at 5a, along with the authority to exclude non-Indians from tribal lands, the court of appeals determined that respondent Tribe had built up the wildlife on its Reservation and seeks now to manage it for economic return. Appendix at 6a. Under these circumstances, the court held, concurrent state jurisdiction in respect of nonmember hunting and fishing is ousted for it would interfere with the Tribe's efforts to manage, preserve and improve wildlife resources on the Reservation.

New Mexico cannot interfere by attempting to control nonmember hunting and fishing conducted exclusively on reservation land "any more than it could do so if the activities in question took place in one of New Mexico's neighboring states." Appendix at 6a.

The court of appeals thereupon affirmed the judgment of the district court and ordered reinstated its previous decision. In that decision, the court of appeals had held that application of New Mexico's wildlife conservation laws to nonmembers would infringe on the right of the Tribe to govern itself per the rule in *Williams* v. *Lee*, 358 U.S. 217 (1959). Specifically, the court of appeals found that state regulation would (1) financially impair the tribe's hunting and fishing enterprise; (2) interfere with the tribal regulatory program over its "reservation's resources"; and (3) deny the tribe an opportunity to develop its own system of wildlife management. Appendix at 26a-28a.

A basic premise of the Tenth Circuit's ruling is the court's observation that dual regulatory schemes create dislocations. Because of this characteristic of dual regulation, the court stated, "[W]e presume, when Indian tribes under federal protection seek to regulate *their traditional interests*, that federal law has preempted state jurisdiction." Appendix at 20a. The Tenth Circuit doctrine of presumed preemption, operative when a tribe involves itself in a "traditional interest," finds no support in the cases. Quite to the contrary, in *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980), this Court stated that, while a tribe could itself preempt state taxation through the exercise of properly delegated federal power to do so,

> [W]e do not infer from the mere fact of federal approval of the Indian taxing ordinances, or from the fact that the Tribes exercise congressionally sanctioned powers of self-government, that Congress has delegated the far-reaching authority to pre-empt valid state sales and cigarette taxes otherwise collectible from nonmembers of the Tribe.

447 U.S. at 156. The Tenth Circuit's willingness to presume what the Supreme Court refuses to infer lies at the core of the infringement aspect of the instant case. The Ninth Circuit in

White Mountain Apache Tribe v. *Arizona*, 649 F.2d 1274 (9th Cir. 1981), like this a case involving application of state wildlife conservation laws to nonmembers for on-reservation acts, also refused to infer a "far-reaching authority" in tribes to preempt state fees and regulations applicable to nonmembers. 649 F.2d at 1281.

The contradictory results being reached in the federal courts on this question seem to us to manifest the larger uncertainty surrounding the reach of state taxing and regulatory powers on a reservation when nonmember activities are involved. As recent decisions of this Court have moved toward "particularized inquiry" into the nature of state, federal, and tribal interests at stake, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145 (1980), more recently described as "flexible consideration" of these interests, *Ramah Navajo School Board* v. *Bureau of Revenue*, ____U.S.____, 50 U.S.L.W. at 5104, with individual decisions rendered on seemingly *sui generis* principles, the lower federal courts have become increasingly engaged in policy choices, essentially legislative in character. Cf. *Oklahoma Tax Comm'n* v. *Texas Co.*, 336 U.S. 342, 365-66 (1949). States now stand at risk of being divested of jurisdiction by ad hoc federal court determinations based on isolated valuations of the validity, worth or need for the particular state regulatory or taxing measure without regard to any general fundamental principles. Indeed, the Solicitor General last Term invited this Court to establish as a rule of law that, at least in the area of state taxation of nontribal business, on-reservation activities involving a resident tribe are presumptively beyond the reach of state law even in the absence of comprehensive federal regulation. 50 U.S.L.W. at 5104. This invitation, which would place on the state the burden to demonstrate that its taxing activity is either condoned by Congress or justified by a compelling need to protect legitimate state interests, was specifically declined by the Court which chose instead to remain with its flexible approach.

The Tenth Circuit in the instant case employed a standard which goes beyond even the Solicitor General's suggestion in *Ramah Navajo*. Application of this standard would endow

Indian reservations with virtually the same territorial sovereignty as is enjoyed by the states with respect to civil jurisdiction. The Tenth Circuit's formulation leaves no room for the application of state regulation to nonmembers unless specifically authorized by Congress.

If one properly applies the flexible, particularized approach of *Bracker* to the federal, state, and tribal interests at stake in this case, we think it apparent that the ruling of the court below is erroneous. But, further, it seems to us, application of *Bracker* by lower federal courts in the cases involving application of state wildlife laws to nonmembers has had the effect of trivializing important aspects of state sovereignty, permitting divestiture of state jurisdiction by federal courts on the basis of idiosyncratic reaction to evidence, evidence which may later prove to be ephemeral although it results in rulings that are final. For example, the Ninth Circuit has indicated that, in applying the *Bracker* test, it will examine whether the wildlife in question range on and off a reservation. As we discuss herein, the applicability to nonmembers of state wildlife conservation laws should be made to depend on more fundamental bases.

On the infringement with tribal government aspect of the case, therefore, it is petitioner's position that a proper analysis of the particularized interests of federal, tribal and state governments demonstrates that New Mexico's wildlife conservation laws are applicable to nontribal members without infringing tribal self-government. But we urge this Court to go further and clarify application of *Bracker* in wildlife cases such as this so as to remove, as much as is reasonably possible, the considerable uncertainty that now seems to prevail.

B. State Regulation of Nonmember Hunting and Fishing on the Mescalero Reservation Does Not Threaten the Economic Security or Disrupt the Regulatory Activity of the Tribe

While the *ratio decidendi* of the lower court's infringement holding is difficult to isolate, the ultimate factor appears to be the "bottom line." "The unquestioned importance to the Tribe of the game revenues contributed to the district court's determi-

nation that tribal self-government was infringed upon, and we affirm that finding." Appendix at 27a. The importance of revenues to the Tribe is linked with the assertion by the court of appeals that inherent sovereignty permits the Tribe "to determine how its reservation's resources shall best be regulated." Appendix at 6a.

The problem with the "impairment of revenues" argument is twofold: it is wholly unsupported by the record which, in fact, points in the very opposite direction, and it is insufficient in law. The record clearly establishes that the Tribe has encountered very little, if any, difficulty in selling licenses. A stipulation made between the parties during 1977 and introduced in evidence in this proceeding includes the following facts:

> (1) From at least 1971 through 1974 all of the big game licenses including deer, elk and bear, authorized by the Mescalero Apache Tribe were sold. During this period a large number of fishing permits was likewise sold by the Mescalero Apache Tribe.[21]
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> (2) All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1975-1976 hunting season including deer, elk and bear, were sold. During this period 19,454 fishing permits were likewise sold by the Mescalero Apache Tribe.[22]
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> (3) For the years 1972 through 1976, the Mescalero Apache Tribe issued the following number of fishing permits: 1972, 9,521; 1973, 10,985; 1974, 9,135; 1975, 19,454; 1976, 29,163. State of New Mexico fishing licenses have been required each year for non-Indian fishermen either by the Tribe or by court order.[23]
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> (4) All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1976-1977 hunting season, including deer, elk and bear, were likewise sold by the Mescalero Apache Tribe.[24]

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[21] Respondent's Appendix at 35a.
[22] Id., at 35a-36a.
[23] Id., at 18a.
[24] Id., at 36a.

(5) All of the big game hunting licenses and package hunts authorized by the Mescalero Apache Tribe for the 1977-1978 hunting season, including deer, elk, bear and antelope, were sold except four of the ten antelope licenses which were authorized for the first time in 1977. During this period an undetermined number of fishing permits was likewise sold by the Mescalero Apache Tribe.[25]

(6) Many applications for big game licenses and package hunts have had to be turned down each year that they have been made available by the Mescalero Apache Tribe because the number of such applications has exceeded the number of licenses and package hunts that have been made available by the Tribe.[26]

(7) The revenues the Mescalero Apache Tribe receives from the sale of hunting and fishing, and picnicking and camping permits and package hunts at the Inn of the Mountain Gods has increased from $7,787 in 1961 to $269,140 in 1976. Prior to and during this period the State of New Mexico has enforced its hunting and fishing laws and regulations against non-Indians hunting or fishing within the Mescalero Apache Reservation, after they have departed the Reservation.[27]

In light of these stipulated facts it is extraordinarily difficult to understand the assertion by the court of appeals that application of state law interferes with the Tribe's effort to manage, preserve and improve wildlife resources and "would render much of the tribal regulatory scheme a nullity." Appendix at 11a, 6a.[28] The plain fact is that the Mescalero hunting

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[25] Id., at 36a.

[26] Id., at 36a-37a.

[27] Id., at 38a-39a.

[28] During the hearing on the Tribe's application for preliminary injunction, the Tribe's president knew of no instances where hunters had been discouraged by state law from hunting on the reservation:

> Q. Well, let me ask you, Mr. Chino, do you know of any instance in which any hunter who has expressed an interest to hunt on the Mescalero Reservation has been dissuaded or deterred from doing so because of fear that he will be prosecuted by the State of New Mexico if he violates any of the laws or regulations of the State pertaining to hunting or fishing?
>
> A. Not to my personal knowledge.

Jt. Appendix at 130a.

and fishing enterprise is part of a tourism program designed to attract income for the Tribe, and the Tribe has encountered little, if any, difficulty in selling licenses, if that be a dispositive factor on which state jurisdiction hinges.[29] *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463 (1976), makes clear that Indians do not have an absolute entitlement to achieve some particular sales volume by passing their tax-exempt status to non-Indian customers. See *Washington* v. *Confederated Tribes*, 447 U.S. at 173 (concurring opinion of Brennan, J.). Moreover, the complaint contains no allegation that the State has abdicated or abused its trust responsibility for protecting and managing wildlife, that it has established its season, bag or creel limits in such a way as to impair treaty or other Indian rights to fish or hunt on the Mescalero Reservation, or that more stringent regulations apply to nonmembers when on the Reservation than in other parts of the State. See *Montana* v. *United States*, 450 U.S. at 566, n. 16.

Indeed, the complaint and the decisions of both lower courts appear to be founded on the very "mechanical or absolute conceptions" of tribal sovereignty which *Bracker* has taken out of vogue.[30] Not only is there no significant impairment of license sales there is neither allegation nor evidence of any significant conflict in the tribal and state regulatory structures which might, conceivably, serve as the basis for a finding of impairment of some tribal right. *Montana* v. *United States*,

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[29] Richard A. Wardlaw, administrative assistant to the president of the Tribe, testified that in 1976 the Tribe charged $1,400 for a bull elk package hunt. "Of that, $400 went to the Inn and a thousand dollars went to the Tribe on the bulls." Jt. Appendix at 143a. In 1977 the Tribe charged $2,000 for a bull elk package hunt. Plaintiff's Exh. 39; Jt. Appendix at 90a.

[30] The court of appeals dealt with the lack of evidence of impairment in its discussion of standing and, finding no actual impairment, developed a theory of imputed financial impairment. "Even though all tribal licenses are now sold, and applications for licenses exceed the number available, that fact merely reflects the Tribe's conservative adjustment to market forces in devising its own fee structure." Appendix at 14a. In other words, the court of appeals assumed that the Tribe could maximize the price of its licenses if it were not necessary for the sportsman to possess a state license. But this imputation fails as well. If a tribe is not entitled to achieve a particular sales volume, Moe v. Salish & Kootenai Tribes, supra, it is similarly not entitled to achieve any particular price level.

450 U.S. at 566, n. 16.[31] As in the Tenth Circuit's financial impairment analysis, the analysis of regulatory impairment by the court is based not on actual impairment or nullification but on the theoretical assertion that dual regulatory schemes create mutual dislocations. Appendix at 20a. Except for its *ipse dixit*, there is no basis for the Tenth Circuit's determination that application of state law threatens to financially impair the Tribe's hunting and fishing business.

A second aspect of the Tenth Circuit's infringement determination is that application of New Mexico's wildlife conservation laws to nonmembers would "interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on its reservation." Appendix at 6a. The apparent basis for this determination is that the Tribe, with the aid of the federal government, has built up and managed the wildlife on its Reservation, that this has been accomplished without state aid, and that the Tribe now seeks to enjoy these benefits. Citing *Washington* v. *Confederated Tribes* for the proposition that Indian tribes have an interest in raising revenues for essential government programs, an interest which is strongest when the revenues are derived from value generated on the reservation and the taxpayer is the recipient of tribal services, 447 U.S. at 156-157, the court of appeals concluded that there is no evidence that the state supplies any management service on the reservation where the hunting occurs. Under such circumstances, the court of appeals concluded, it is up to the Tribe "to determine how its reservation resources shall best be regulated," Appendix at 6a, and concurrent jurisdiction would "interfere with the Tribe's efforts to manage, preserve, and improve wildlife resources on [the] reservation." Appendix at 6a. There are a multitude of problems with this line of reasoning.

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[31] Indeed, although at least one regulatory conflict remained, it was stipulated, Respondent's Appendix at 25a-26a, that the New Mexico State Game Commission had in the past amended its regulations to accommodate tribal preferences. The one conflict, concerning the state prohibition on holding an elk license two years in a row, is a conflict of modest proportions, particularly because it is platonic in nature, there being no evidence that any person had sought in fact to hunt elk on the Reservation two consecutive years.

(1.) *Fish and Wildlife Are Not Tribal Resources.* Fish and wildlife not kept in enclosures or tamed or domesticated but which instead are in a state of nature are regarded as *ferae naturae.* In *McKee* v. *Gratz*, 260 U.S. 127 (1922), the Court through Justice Holmes referred to game birds or freely moving fish that "may shift to another jurisdiction without regard to the will of the landowner or state," and that are in possession of no one. 260 U.S. at 135. This is the very essence of animals *ferae naturae* and, as we have said above, governmental claims of ownership to animals *ferae naturae* are no longer recognized. Statutes declaring title to game and fish to be in the state, according to Justice Holmes, "[S]poke only in aid of the state's power of regulation." 260 U.S. at 135. The fish and wildlife found on the Mescalero Reservation, therefore, unlike the minerals in *Merrion* or the timber in *Bracker*, are not tribal property.

A question nearly identical to the instant question was addressed by the Solicitor of the Department of the Interior in 1971 and, while this formal opinion was withdrawn in 1976 without comment, its reasoning survives. 78 I.D. 101 (1971). The Ute Tribe had obtained one hundred elk from a Yellowstone Park herd, paying for their transportation and release on the reservation. Utah permitted the taking of elk by residents but not by nonresidents. The Commissioner of Indian Affairs sought advice on whether the tribe may allow nonresidents to hunt, indicating that the tribe would be deprived of a substantial source of income if nonresident hunting were not permitted. Advising that nonmembers are subject to state game laws while on an Indian reservation, the Solicitor reasoned that since states do not "own" wild game neither could an Indian tribe unless it were thought that tribal sovereignty is a sovereignty superior to that of the states or the federal government, a notion rejected as implausible. If the tribe had captured and confined the elk, the Solicitor observed, an argument in favor of tribal ownership would be stronger. Absent that, "there can be no individual

property in fish and game so long as they remain wild, unconfined, and in a state of nature." 78 I.D. at 102.[32]

Nothing in the treaties with the Mescalero or the Executive Order of March 24, 1883, establishing the present boundaries of the Reservation makes mention of rights or privileges of hunting and fishing. Nevertheless, it is held that hunting and fishing rights are implicitly held by the tribe. *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968). The traditional tribal right, however, is inseparably connected with tribal membership and is not transferable.[33] The analysis of the Tenth Circuit decision begins by finding in the Tribe inherent authority over wildlife which, it is said, "stems largely from the traditional reliance on wild game for basic survival needs." Appendix at

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[32] The converse question is treated in an earlier solicitor's opinion. In Hunting, Fishing and Trapping Rights of the Nez Perce Indians, 60 I.D. 368 (1949), the Commissioner of Indian Affairs asked whether Idaho could apply its conservation laws to Indians of the Nez Perce Reservation if the state stocked the reservation with fish and game. The Solicitor (Mastin G. White) thought it plain that the question must be answered in the negative:

> In the modern world, property and sovereignty have been regarded as distinct concepts. The power to regulate the taking of fish and game is an aspect of sovereignty; and the sovereignty of a State does not (in the absence of consent by Congress) extend to the members of an Indian tribe on an Indian reservation. Moreover, the State cannot assert ownership of fish and game with which it may stock a particular area, for the rule has long been recognized that there is no property in fish and game once held captive but since returned to a state of nature. They are regarded as *ferae naturae*.

60 I.D. at 370-71.

[33] The opinion of the Interior Solicitor (J. Ruell Armstrong) in Klamath Terminal Legislation, 62 I.D. 186 (1955), answers a number of questions relating to members of the Klamath Tribe who elect under the Act of August 13, 1954 to withdraw from the tribe and have their interest in tribal property converted into money. In answer to a question whether hunting and fishing rights have an appraisable value which should be included in the sum to be paid to a withdrawing member, the opinion of the Solicitor states: "No decision of which we are aware has held that the right to hunt and fish on the tribal lands is a property right which is vested in the individual member of the tribe. It is a right which the member may exercise in common with other members of the tribe. The right is inseparably connected with membership and when membership ceases, the right comes to an end. The right is not subject to transfer and is incapable of transmission by descent or devise. Accordingly, it has no appraisable value which can properly be included in the sum to be paid to withdrawing members." 62 I.D. at 194.

17a. But, from this point on the logic of the argument collapses for there is no nexus shown to exist between hunting and fishing, which were recognized in the treaties as normal incidents of Indian life, *Menominee Tribe* v. *United States*, 391 U.S. at 405, n. 2, and the Mescalero's commercial enterprise whose success depends upon maximizing harvest of fish and wildlife, not by Indians who possess rights inseparably connected with tribal membership, but by non-Indians who do not. Indeed, there is absolutely no relationship between traditional Indian hunting and fishing and the package hunts for big game held when the days grow short, not out of conformity to tribal tradition, but in order to stimulate business at the Inn of the Mountain Gods by sandwiching in hunters and fishermen between the summer tourist season and the winter ski season.[34]

If the purpose of the Tribe's implied immunity from state wildlife conservation laws is food for basic survival, as the court states, and the maintenance of traditional ways, which we would add, immunity attaches to activity reasonably falling within the scope of the purpose. But, manifestly, it is not the purpose of the right to provide tribal revenues. The Mescalero hunting and fishing enterprise is simply not within the purpose; it is a secondary use of wildlife to which the tribal immunity does not attach. Cf. *United States* v. *New Mexico*, 438 U.S. 696, 702 (1978); *United States* v. *Top Sky*, 547 F.2d 486 (9th Cir. 1976).

(2.) *State Regulation Does Not Interfere With Tribal Management.* The court of appeals concluded that application to nonmembers of New Mexico's wildlife conservation laws would interfere with tribal efforts to "manage, preserve, and improve" reservation wildlife resources. There is no support in the record for this remarkable conclusion nor is it based on any finding of the trial court. The only conceivable grounds for

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[34] Paragraph 7 of the stipulation provided in part: "Package hunts of big game animals are held to help stimulate business at the Inn of the Mountain Gods. Package hunts normally occur between the summer tourism season and the winter ski season. The purpose of the tourism program is to provide income for [governmental purposes and economic development]." Respondent's Appendix at 9a.

such a conclusion are that under state law elk hunters may not hunt during two consecutive years and that, as a matter of economics, the Tribe may not be able to charge higher prices for its licenses. While the first item is part of the record herein, there was no evidence for the second, viz., that the Tribe's fees had reached levels which would discourage hunters and fishermen. Indeed, the evidence was to the contrary, and the Tenth Circuit's inelasticity of demand analysis was purely theoretical.

Neither was there any allegation in the complaint or evidence that state conservation laws had impaired the ability of the tribe to "preserve" or "improve" wildlife on the reservation. The words "preserve" and "improve" are not terms of art in wildlife conservation but carry their common meanings. The record flatly contradicts the conclusion that tribal efforts to improve and preserve have in any way been impaired by the state.[35]

The word "management" is, in fact, a term of art in wildlife conservation and has been defined by Congress in the Marine Mammal Protection Act as follows:

> [T]he collection and application of biological information for the purposes of increasing and maintaining the number of [marine mammals] at the optimum carrying capacity of their habitat. Such terms include the entire scope of activities that constitute a modern scientific resource program including, but not limited to, research, census, law enforcement, and habitat acquisition and improvement. Also included within [the term "management"], when and where appropriate, is the periodic or total protection of species as well as regulated taking.

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[35] New Mexico retains the right to take steps necessary to preserve species of fish and wildlife on the Mescalero Reservation. Even treaty rights may be controlled by a state by the need to conserve a species and thus the state retains the right to control hunting and fishing by tribal members where necessary to preserve a species found within the state or to prevent its progressive depletion. Washington Game Dept. v. Puyallup Tribe, 414 U.S. 44, 49-50 (1973).

§ 3(2), 86 Stat. 1028, 16 U.S.C. § 1362(2).[36] It is obvious that state law does not interfere with the ability of the Tribe to conduct research, censusing, law enforcement, habitat acquisition and improvement, or total protection of fish and wildlife. The special interest of the state in wildlife is at its strongest in the area of taking, and it is in this area that the fit between the state and the tribal system is not a perfect congruence. But unless there is some showing that the lack of congruence impairs Indian rights or infringes tribal government, there is no basis in law for ousting state jurisdiction.

Moreover, the implied communal right of a tribe, from which individual members benefit, is the right to immunity from state wildlife conservation laws not the right to manage wildlife. Certainly, as a landowner, a tribe may engage in many activities which constitute wildlife management. A tribe, for example, may forbid hunting and fishing by nonmembers, undertake habitat improvements, or engage in research and censusing of wildlife. More than that, as an entity which is sovereign for some purposes, it may enact regulations establishing when and how individual members may exercise communal hunting and fishing rights. This determination is a power which a tribe retains under its inherent power to regulate internal affairs, *Williams* v. *Lee*, 358 U.S. at 221-222, and is held to extend even to tribal members exercising treaty fishing rights off-reservation. *Settler* v. *Lameer*, 507 F.2d 231 (9th Cir. 1974). But the tribal immunity may not be parlayed into exclusive tribal jurisdiction simply by characterizing the immunity as the right to manage wildlife. The two concepts are not synonymous.

We think it is plain that no basis exists for the Tenth Circuit's conclusion that application of New Mexico's wildlife conservation laws to tribal nonmembers would infringe on the

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[36] While we acknowledge that few marine mammals reside within the exterior boundaries of New Mexico, the definition of "management" in the Marine Mammal Protection Act of 1972 transcends marine mammals and is equally applicable to terrestrial forms of wildlife other than endangered species. In the case of endangered species, a slightly different definition applies because, by the very nature of the beast, regulated taking of endangered species represents the extraordinary situation. See § 3(2), Endangered Species Act of 1973, 87 Stat. 885, 16 U.S.C. § 1532(2).

right of the Mescalero Apache Tribe to govern itself. By definition, an inability to transfer tribal immunity to nonmembers does not derogate the Tribe's ability to govern members nor, again by definition, does it nullify or impair tribal enjoyment of the implied communal right. The inability impedes no clearly expressed federal interest, as in *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), nor has the federal government undertaken comprehensive regulation as in *Bracker*. State regulation of nonmember hunting and fishing does not bear closely enough on the federal interest in self-determination for Indian people to infringe tribal self-government. Cf. *Fort Mojave Tribe* v. *County of San Bernardino*, 543 F.2d 1253 (9th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977).

Indeed, the court's expansive reading of tribal self-government is at variance with *Montana* v. *United States* where this Court was unable to find in the regulation of hunting and fishing by nonmembers on fee patented lands a "clear relationship" to tribal self-government or internal relations. 450 U.S. at 564. As this Court viewed the issue, nothing in the *Montana* case suggested that such nonmember hunting and fishing would "so threaten the Tribe's political or economic security as to justify tribal regulation." 450 U.S. at 566. The Court in *Montana* reaffirmed the notion that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." 450 U.S. at 564. Having distinguished *Montana* as inapplicable, however, the court of appeals was not moved by this Court's reaffirmation that tribal self-government is not territorial sovereignty.

C. Whether State Wildlife Conservation Laws Infringe on Tribal Self-Government Should Rest On Considerations of a Fundamental Nature

In the exercise of its trustee responsibilities the ultimate state interest is the security and relative equilibrium of fish and wildlife species found within its borders. Indeed, even treaty

rights are controlled by the need to conserve a species. *Washington Game Dept.* v. *Puyallup Tribe*, 414 U.S. 44 (1973). In examining the state and tribal interests at stake here, as called for by *Bracker*, the court of appeals weighed the need for tribal revenue with the state interest in wildlife and found that the scales tipped in favor of the Tribe. The court felt that the value involved here had been generated on the reservation by the Tribe and that state services received on-reservation were minimal. Appendix at 26a. But whereas the Tenth Circuit found the matter of game revenues to be of "unquestioned importance," the Ninth Circuit deemed a decrease in tribal revenues "not overly weighty." *White Mountain Apache Tribe* v. *Arizona*, 649 F.2d at 1283. The *White Mountain Apache* court, on the other hand, was interested in whether the wildlife in question range on and off the reservation. 649 F.2d at 1283.

We have no quarrel with the *Bracker* analysis which calls for a particularized inquiry into the nature of the state, federal, and tribal interests at stake. In line with modern congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency, the particularized inquiry analysis called for in *Bracker* was designed to move away from resolution of disputes by application of broad *per se* conceptions. Nevertheless, it is one thing to utilize particularized inquiry to resolve situations where "both the tribe and the State could fairly claim an interest in asserting their respective jurisdictions," *McClanahan* v. *Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973), and another thing entirely to trivialize the special state interest in wildlife by hinging it upon the existence *vel non* of conditions which do not take the measure of that interest. In the instant case, for example, the court of appeals ousted state jurisdiction because of a theoretical impact of dual regulation on tribal revenues even though such revenues were in fact increasing. While the impact on tribal treasuries is the type of factor which Congress might consider, it does not in our view

constitute infringement of tribal government unless its impact is so severe as to impair the tribe's ability to function.[37]

Whether wildlife range on and off the reservation is similarly an unsuitable basis on which to hinge state jurisdiction. In the instant case it was stipulated that part of the elk, deer and bear populations range on and off while the antelope population seldom leaves the reservation. Respondent's Appendix at 15a. If the range of wildlife were a significant factor in the allocation of jurisdiction, then some of the species on a reservation might end up under concurrent jurisdiction and other species not, with the results depending largely on the configuration of the particular reservation and migration patterns at a particular time. Dual regulation would be likely for smaller reservations and exclusive tribal jurisdiction in the larger reservations. On larger reservations, however, dual regulation would result if wildlife populations happened to reside on the periphery.

The interest of the state has traditionally pertained to fish and wildlife which are *ferae naturae*. The relevant issue in our view is not whether wildlife range on and off a reservation but whether, for example, they are penned up or domesticated. Unless a more fundamental decisional calculus such as this is established, the basis for a finding of jurisdiction will likely change over time as wildlife, paraphrasing Justice Holmes, shift to another jurisdiction without the will of the tribe or the state. New Mexico contains nineteen Indian pueblos and seven

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[37] The Supreme Court has rejected arguments under the Natural Gas Act of 1938 that the impact on state treasuries of natural gas rates in interstate commerce must be considered. In re Permian Basin Area Rate Cases, 390 U.S. 747, 822, n. 114 (1968); Federal Power Comm'n v. Hope Gas Co., 320 U.S. 591 (1944). Similarly, with respect to federally established rates for intrastate gas, it is held that unless the impact is so severe as to impair the state's ability to function effectively in a federal system, federal regulation which has an indirect effect on state treasuries is not the same impermissible intrusion on state sovereignty found in National League of Cities v. Usery, 426 U.S. 833 (1976). See Public Service Co. v. Federal Energy Regulatory Comm'n, 587 F.2d 716 (5th Cir. 1979), cert. denied, 444 U.S. 879; Oklahoma v. Federal Energy Regulatory Comm'n, 494 F.Supp. 636, 657 (W.D. Okla. 1980), aff'd 661 F.2d 832 (10th Cir. 1981).

Indian reservations, Respondent's Appendix at 3a; the State of Washington, for example, has twenty-two reservations. Owing to the trustee responsibilities of a state, case-by-case adjudication may well be required unless more fundamental state wildlife interests are recognized by this Court.

The court of appeals also identified an intention to preempt state jurisdiction as "an element in the Tribe's favor." Appendix at 11a, n. 3. But, absent specific congressional authority, a tribal attempt to preempt state power by simply enacting an ordinance inconsistent with the power and authority of the state is void, *Fisher* v. *District Court*, 424 U.S. 382 (1976), and should not weigh in the balance at all.

Finally, two other interests which have been identified underscore the need for more fundamental determinants of jurisdiction. The court of appeals observed that value on the reservation had been generated by the Tribe with the aid of the federal government and that state services were minimal. Appendix at 26a. Presumably the court of appeals had in mind a national fish hatchery, operated on the Reservation by the U.S. Fish and Wildlife Service, which provided fish for stocking Reservation waters, and the importation of elk donated by the National Park Service. Respondent's Appendix at 12a, 14a. But, again, considerations such as these may also prove ephemeral. During 1982, for example, Congress withdrew funding for the operation by the Fish and Wildlife Service of a number of national fish hatcheries, including the Mescalero hatchery, the House Committee noting that it had "no objection" to Bureau of Indian Affairs funding of the hatchery but appropriating no additional funds therefor. H.Rep. No. 97-942, 23, 56 (1982).

A balancing of interests by reference to past contributions to fish and wildlife is legitimate so long as the focus is sufficiently broad. Thus, for example, in a state such as New Mexico which produces and maintains big game populations, the contributions thereto by the people of the state are not measured solely by reference to stocking of a particular stream or transplantation at a particular location but instead to the

entire spectrum of activity which makes it possible for a state to support big game populations in huntable numbers. Some of these contributions were alluded to by this Court in *Baldwin* v. *Montana*, 436 U.S. 371, 389 (1978), including taxes for support of access roads, for support of fire suppression to protect wildlife habitat throughout the state, and for support of statewide air and water quality standards. As the Court noted in *Baldwin*, forage support by ranchers is critical to winter survival of big game in many situations. The New Mexico Department of Game and Fish undertakes extensive, ongoing research and experimental programs into problems of fish and wildlife management encountered within the state. See, e.g., Defendants' Exhibit No. AG. A major state concern is also to arrest the spread of infectious diseases in wildlife. New Mexico maintains control programs through the Department of Game and Fish and the Department of Health and Environment against the outbreak or introduction of contagious wildlife diseases which could result in destruction of both cattle and wildlife, a legislative concern of the State of New Mexico.[38] A failure to consider such larger contributions focuses the analysis too narrowly for, as the district court stated in *Mescalero Apache Tribe* v. *O'Cheskey*, 439 F.Supp. 1063, 1073 (D. N.M. 1977), the Mescalero Reservation is situated in New Mexico, "not located by itse. on another planet."

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[38] For example, the Legislature in 1927 enacted the following provision:

> In order to protect game animals, birds and fish against importation of undesirable species and introduction of infectious or contagious diseases, it is a misdemeanor to import any live animals, birds or fish into this state, except domesticated animals or fish from government hatcheries, without first obtaining a permit from the department of game and fish.

§ 17-3-32, NMSA. See also § 17-2-32, NMSA (relating to bubonic plague in animals).

CONCLUSION

For all the reasons set forth above, the decision of the court of appeals should be reversed.

Respectfully submitted,

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In The
Supreme Court of the United States
October Term, 1982

STATE OF NEW MEXICO and HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

vs.

MESCALERO APACHE TRIBE,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. Whether federal law, examined in light of broad underlying federal policies and the traditional right of tribal self-government, has preempted state regulation of wildlife resources within the Mescalero Apache Reservation.

2. Whether state regulation of wildlife resources within the Mescalero Apache Reservation constitutes an impermissible interference with the right of the Mescalero Apache Tribe to self-government and territorial management.

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STATEMENT OF THE CASE

A. Statement of Facts

This case was presented to the United States District Court of New Mexico largely on a stipulation of facts by the parties, set forth in Respondent's Appendix at 1a-41a.[1] Two hearings were held at which the district court received testimony on matters of fact.

The Mescalero Apache Tribe is a federally recognized Indian tribe governed by its Constitution of January 12, 1965, which was adopted pursuant to the Indian Reorganization Act, 25 U. S. C. Sec. 476 (Res. App. at 2a).

The Tribe signed a Treaty with the United States on July 1, 1852, which submitted the Tribe and its members exclusively to the laws, jurisdiction, and government of the United States of America (*id.* at 4a). Article 9 of the Treaty provided that the United States government would, at its earliest convenience, designate, settle, and adjust the boundaries of the Mescalero Apache lands (*id*). The Reservation of the Mescalero Apache Tribe was confirmed by a Presidential Order in 1873, and was established as it presently exists by an Executive Order dated March 24, 1883. The Reservation is located entirely in the aboriginal territory of the Mescalero Apache Tribe in the State of New Mexico (Res. App. at 2a-6a; Pet. App. at 39a). The Mescalero Apache Reservation contains 460,000 acres belonging to the Tribe, but only 180-185 acres that are held in fee by non-Indians (Pet. App. at 6a).

The federally-approved Constitution of the Mescalero Apache Tribe provides that the control of reservation lands shall be in the Tribal Council and further provides that the Tribal Council shall have the power and duty "to protect and preserve the property, wildlife and natural resources of the tribe" (Jt. App. at 45a, 52a-53a). The Constitution also provides that any ordinance directly af-

[1] "Res. App." refers to the appendix in The Opposition to Petition For a Writ of Certiorari; "Pet. App." refers to the Appendix in the Petition for Writ of Certiorari; "Jt. App." refers to the Joint Appendix herein.

fecting non-members of the Tribe shall be subject to review by the Secretary of the Interior (*id.* at 53a).

Over the past several years, the Mescalero Apache Tribe has developed an extensive tourism program designed to bring income and employment to the Reservation (Pet. App. at 39a). As a part of that program and in order to better manage and control its wildlife resources, the Tribe, pursuant to its Constitution, has developed a comprehensive scheme regulating all aspects of hunting and fishing on the Reservation (*id.*). The Tribal Council has adopted hunting and fishing ordinances requiring tribal licenses for all hunters and anglers, setting bag limits, and establishing programs and seasons for hunting and fishing on the Reservation, all duly approved by the Secretary of the Interior (*id.*). Game tags are issued with each tribal license, and are required to be attached to game taken on the Reservation (Res. App. at 11a). Tribal regulations are enforced through citations by tribal officers to tribal courts or to federal courts pursuant to 18 U. S. C. Sec. 1165 (Jt. App. at 165a).

The revenue derived directly and indirectly from hunting and fishing on the Reservation constitutes a significant economic benefit to the Tribe, and provides tribal members a wide range of governmental and social services (Pet. App. at 11a, 39a). In recent years, direct tribal revenue from the sale of hunting and fishing permits, package hunts at the Inn of the Mountain Gods tourist complex, and campground and picnic permits has exceeded $250,000.00 per year (*id.* at 11a n. 4). Additional indirect revenue is generated through the tourism program (*id.* at 9a). The tribal hunting and fishing program also provides employment opportunities to a substantial number of tribal members (Res. App. at 6a-10a).

Hunting and fishing by nonmembers on the Mescalero Apache Reservation comprises, however, only a miniscule portion of total hunting and fishing in the State of New Mexico (Pet. App. at 11a-12a). The relative size of the tribal operation is indicated by the number of licenses

sold in comparison to the number sold in the state as a whole. In a recent year, 50 elk licenses were sold, compared to 14,000 by the State; ten tribal antelope licenses were available, compared to 3,500 for the State; and 500 tribal deer licenses were available, compared to 100,000 for the State (*id.* at 12a n. 5). The State Director of the Fish and Game Department testified that the total number of hunters on the Reservation was "insignificant" (Jt. App. at 211a). The tribe has restricted the number of hunting opportunities to a level consistent with good conservation practices by turning down applications for big game licenses and package hunts (Res. App. at 36a). The vast majority of the non-Indian hunters and anglers on the Reservation are non-residents of the State of New Mexico (Res. App. at 39a).

The Mescalero Apache Tribe conducts a complete fish and game management program exclusive of the State of New Mexico (Pet. App. at 41a). The Tribe employs seven full-time conservation officers who assist a Bureau of Indian Affairs range conservationist with game management, aerial surveys, and pellet group transect studies to determine the deer, elk, antelope and bear populations on the Reservation (Pet. App. at 39a-40a). The results of these studies are submitted to the Tribal Council for its consideration in setting bag limits and seasons (Jt. App. at 25a).

Much of the reservation wildlife is effectively a creation of the Tribe and Federal Government (Pet. App. at 12a). Prior to 1966, elk population in the vicinity of the the Reservation was estimated at 13. In 1966-1967, the National Park Service donated an elk herd to be released on the Mescalero Apache Reservation (*id.* at 40a). The Tribe performed considerable range development in order to remove cattle from direct competition with the elk herd, and the elk population is now estimated at 1200 (*id.*). The Reservation has sufficient food, water and variety of elevation to support elk year round. The elk are migratory and therefore provide increased hunting opportunities for

non-members outside the Reservation (*id.* at 12a, 40a). The antelope poulation on the Reservation is non-migratory (Pet. App. at 12a).

The Reservation has no natural lakes (*id.* at 40a). Several man-made lakes have been constructed over the years with federal funds, some of which also have picnic and camping facilities constructed by the Tribe (Res. App. at 13a). The State of New Mexico has never stocked any lake within the Mescalero Apache Reservation. Since 1976, the State has not stocked any streams (*id.* at 14a). From 1970 until 1976, the State stocked only part of one stream on the Reservation (*id.*). The Bureau of Sport Fisheries and Wildlife of the United States Fish and Wildlife Service, Department of the Interior, operates a National Fish Hatchery on the Reservation, and provides technical assistance in the management and development of fishery resources in Reservation waters (Pet. App. at 40a). A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation (Res. App. at 14a). All waters within the Reservation are stocked exclusively with fish from the National Fish Hatchery at Mescalero (Res. App. at 41a).[2]

Within the boundaries of the Mescalero Apache Reservation, the State of New Mexico, in the last twelve years, has not selected or improved any land or water areas as adaptable for wildlife feeding, resting or breeding places (Pet. App. at 40a-41a). The State has neither adopted nor formulated any plans for restocking lakes and streams with fish, has not conducted research into problems of fish management or administration of fish resources, and has under taken no wildlife restoration projects (*id.*). The State receives federal matching funds through the Pittman-Robertson Act, 16 U.S.C. Sec. 669, and the Dingle-Johnson Act, 16 U.S.C. Sec. 777, for hunting and fishing on the Mes-

[2]The National Fish Hatchery has continued to be operated by the Fish and Wildlife Service with federal funding from the United States Department of the Interior.

calero Reservation, but no evidence was presented that such funds have ever been directly expended on the Mescalero Apache Reservation (Res. App. at 17a-18a). The State has played no significant part in the creation and preservation of reservation wildlife resources (Pet. App. at 12a). The State makes no claim that any species is endangered, and agrees that tribal management of reservation wildlife resources has been in conformance with accepted wildlife management procedures (Res. App. at 32a-33a).

Direct conflicts exist between state and tribal regulations governing hunting and fishing. For example, a tribal ordinance specifically states that no state license shall be necessary for any person hunting or fishing on the Reservation (Pet. App. at 41a). There are many other areas of conflict. Tribal seasons and bag limits for both hunting and fishing rarely, if ever, coincide with those of the State (Pet. App. at 41a). This causes annual conflict between the Tribe and the State, and interferes with the ability of the Tribe to schedule its hunts according to the results of tribal conservation studies and the availability of tribal personnel to monitor the hunts (Jt. App. at 153a-157a). State law prohibits the killing of does, while the Tribe permits a hunter to kill both a buck and a doe, in order to maintain the proper ratio of bucks to does and to prevent deer overpopulation on the Reservation (Jt. App. 153a-154a). State law prohibits a person from hunting elk or antelope in two consecutive years, while tribal law does not (Res. App. at 26a). In the past this conflict has led to the arrest of non-Indian hunters on the Reservation (*id.* at 34a). State law requires juvenile hunters to obtain a Hunter Safety Certificate, while tribal regulations do not (Res. App. at 32a).

Despite its lack of involvement in the protection of wildlife resources on the Reservation, the State has been actively prosecuting non-Indians for violation of New Mexico hunting and fishing laws through acts committed within Reservation limits that were not violations of tribal laws (Pet. App. at 41a).

B. Procedural History

This lawsuit was initiated when the Tribe applied for a temporary restraining order to prevent the State from arresting non-Indian hunters for hunting on the Reservation during one of the Tribe's big game seasons, which began prior to the State's season. On July 7, 1977, the Tribe filed an action for declaratory and injunctive relief, challenging the State's attempt to regulate the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache Reservation. The court enjoined the State from enforcing its game laws against any person for acts done on the Reservation. The court held that "the fish and game ordinances and regulations of the Mescalero Apache Tribe, therefore, authorized and sanctioned by the federal government and accompanied by active federal support of the fish and game program on the Mescalero Reservation, provide the integrated scheme that results in the federal preemption of fish and game law on the Mescalero Apache Reservation" (Pet. App. at 51a-52a).

The Court of Appeals for the Tenth Circuit affirmed the decision of the district court. The court found that the traditional sovereign powers of the Tribe in wildlife management, affirmed and protected by federal treaty, statutory schemes, policies and participation, compelled the conclusion that federal law has preempted the exercise of state power. The Tenth Circuit further found, as an independent ground for its decision, that the exercise of state power would constitute an impermissible interference with tribal self-government.

The State then filed a petition for writ of certiorari in this Court. This Court granted the petition and remanded the case for further consideration in light of the decision in *Montana v. United States,* 450 U. S. 544 (1981). While the Tenth Circuit was reconsidering its decision, this Court decided *Merrion v. Jicarilla Apache Tribe,* 455 U. S. 130 (1982), in which this Court affirmed the broad power of Indian tribes to control and regulate tribal resources on

tribal lands. The Tenth Circuit then reinstated its previous decision, holding that the involvement of tribal trust land distinguished this case from *Montana* and required application of the principles set forth in *Merrion*. The State's second petition for writ of certiorari was granted on November 15, 1982.

SUMMARY OF ARGUMENT

1. The State of New Mexico has presented to this Court a claim of authority to control the management and harvesting of wildlife resources on the Mescalero Apache Reservation. This claim of broad regulatory authority over tribal trust lands is not based on any federal statute, and is therefore without precedent before this Court. The authority to control resources on tribal land is a fundamental attribute of tribal sovereignty, recently reaffirmed in *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130 (1982). This aspect of tribal sovereignty has not been divested by express congressional action or by necessary implication of the Tribe's dependent status. The federal government and the Mescalero Apache Tribe have comprehensively regulated the management and harvesting of wildlife resources on the Reservation. The State's attempt to superimpose its system of regulation is barred by the doctrine of federal preemption.

This Court has recently restated the broad outlines of the premption analysis. *Ramah Navajo School Board v. Bureau of Revenue,* — U.S. —, 102 S.Ct. 3394 (1982); *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980). The application of the doctrine of federal preemption requires a particularized examination of the relevant state, federal and tribal interests. The "guiding principle" of this analysis is that the determination of preemption must be informed by the traditional notions of tribal sovereignty and by federal recognition and encouragement of sovereignty through promotion of tribal independence and economic development.

The interests of the Tribe and the federal government overwhelmingly transcend the minimal interest asserted by the State. The issue in this case is whether the State can regulate wildlife resources on tribal trust land. The Tribe and the federal government have effectively created the wildlife resource on the Reservation, through importation of an elk herd, establishment of a fish hatchery, stocking of streams, construction of lakes for fishing, comprehensive range management, and general conservation activties. With the approval and assistance of the federal government, the Tribe has enacted and enforced comprehensive regulations covering all aspects of hunting and fishing on the Reservation. The tribal hunting and fishing program is an integral part of the Tribe's tourism program, and is an important source of revenue for tribal government and employment for tribal members.

The State has played no part in the development of the wildlife resources, and has expended no funds on the Reservation in recent years. The tribal and federal management of reservation wildlife resources has been exemplary and the State concedes that there has been no adverse impact off the Reservation. Imposition of state regulation would nullify much of the tribal scheme. The hunting and fishing on the Reservation is an insignificant portion of the state-wide total, so the State's revenue interest is minimal.

The federal government has acted to completely preempt state regulatory jurisdiction through the applicable treaty and federal statutes, federal approval of the tribal Constitution and ordinances, and federal participation in the development and management of the resource. Viewed in light of the traditions of tribal sovereignty and federal policy encouraging self-determination, the federal government has clearly indicated its intent to establish reservation wildlife resources as within the exclusive sovereignty of the Mescalero Apache Tribe under general federal supervision and to preclude the application of state law.

2. State regulation of reservation wildlife resources impermissibly interferes with the Mescalero Apache Tribe's inherent right of self-government and territorial management. Regulation of reservation resources is a fundamental aspect of tribal sovereignty. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982). Tribal sovereignty is subordinate to only the federal government. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 153 (1980). Where the Tribe, as sovereign, has a significant interest, not subject to an overriding federal interest, in an activity occurring on tribal lands, its sovereign authority is exclusive.

Dual systems of regulation necessarily create mutual dislocation. If the State is allowed to exercise general regulatory authority over the management and harvesting of reservation wildlife resources, the sovereign power of the Tribe will be meaningless. The Tribe will be powerless to effectively manage reservation fish and game for conservation purposes and for tribal benefit. This Court has recognized that broad state regulatory power over tribal lands could destroy existing tribal governments, and has refused to find such state power in the absence of congressional authorization. *Bryan v. Itasca County*, 426 U. S. 373 (1976).

The State is attempting to regulate a value generated on the Reservation through tribal and federal efforts. Hunters and anglers receive extensive tribal services. The State's interest is minimal or non-existent. Federal policy encourages and protects tribal economic development and management of tribal resources. Only the Tribe can comprehensively regulate all hunting and fishing on the Reservation. The exemplary tribal resource management scheme may be adequately enforced by existing means. Under these circumstances, state regulation is a drastic and totally unwarranted interference with the inherent sovereignty of the Mescalero Apache Tribe and the federal commitment to tribal self-determination.

ARGUMENT

I. Federal Law, Examined In Light Of Broad Underlying Federal Policies And The Traditional Right Of Tribal Self-Government, Has Completely Preempted State Regulation Of Wildlife Resources Within The Mescalero Apache Reservation.

A. The Doctrine of Federal Preemption

The constitutional source of federal power over Indian affairs is the Indian Commerce Clause, U. S. Const., art. I, sec. 8, cl. 3, which states that "[t]he Congress shall have Power . . . to regulate Commerce . . . with the Indian Tribes. . ." This provision places Indian tribes under the plenary authority of the federal government, but the tribes retain all attributes of inherent sovereignty not expressly divested by federal law or necessarily inconsistent with their dependent relation to the federal government. *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 154 (1980). State actions which conflict with these principles of federal law are invalid under the Supremacy Clause, U. S. Const. art. VI, cl. 2.

The two complementary principles of broad federal power and tribal sovereignty have erected two separate but related barriers to the exercise of state authority over reservation activities: state authority may be preempted by federal law or it may interfere with tribal exercise of sovereign functions. These jurisdictional analyses must be applied with reference to two longstanding canons of construction. The first requires that "statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U. S. 373, 392 (1976). Second, all treaties and statutes must be viewed against the underlying federal policy of leaving Indians free from state jurisdiction and control. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 168 (1973).

The modern doctrine of federal preemption was first clearly identified in *Warren Trading Post Co. v. Arizona*

Tax Commission, 380 U. S. 685 (1965). Arizona had levied a tax on the gross income of a federally-licensed retail trading business on the Navajo Reservation. This Court found that the comprehensive federal scheme for regulation of Indian traders, together with the congressional policy of leaving the Indians "free to run the Reservation and its affairs without state control", and federal assistance in fulfillment of treaty obligations, had completely preempted state jurisdiction. This Court stated that "since federal legislation has left the State with no duties or responsibilities respecting the reservation Indians, we cannot believe that Congress intended to leave to the State the privilege of levying this tax." *Id.* at 691.

Since *Warren Trading Post*, this Court has confirmed the broad scope of the preemption analysis. In *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), this Court examined Arizona's attempt to impose its personal income tax on a reservation Indian whose entire income derived from reservation sources. Noting that the trend was toward reliance on federal preemption as a bar to state jurisdiction, this Court found that the applicable treaties and statutes, viewed against the important backdrop of Indian sovereignty, precluded state jurisdiction. This Court cautioned that "[i]t must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government." *Id.* at 172.

In *McClanahan*, this Court rejected the State's argument that the *Warren Trading Post* holding was restricted to cases involving actual federal regulations inconsistent with state law, and set forth an expanded version of the preemption doctrine:

> The court below distinguished *Warren Trading Post* as limited to cases where the Federal Government has pre-empted state law by regulating Indian traders in a manner inconsistent with state taxation [citations omitted]. But although the Court was, no

> doubt, influenced by the federal licensing requirements, the reasoning of *Warren Trading Post* cannot be so restricted. The Court invalidated Arizona's tax in part because "Congress has, since the creation of the Navajo Reservation nearly a century ago, left the Indians on it largely free to run the reservation and its affairs without state control, a policy which has automatically relieved Arizona of all burdens for carrying on those same responsibilities.

McClanahan, 411 U.S. at 170, n. 6 (1973). Under the *McClanahan* analysis, federal preemption does not require actual conflict with a specific federal enactment, but applies to any matters "within the sphere which the relevant treaty and statutes leave for the Federal Government and for the Indians themselves." *Id.* at 179-80.

Although there is still no "definitive formula" for resolving the question whether a state may exercise jurisdiction over reservation activities, this Court has recently restated the broad outlines of both the preemption analysis and the infringement test. In *Ramah Navajo School Board v. Bureau of Revenue*, — U.S. —, 102 S. Ct. 3394 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), states attempted to impose taxes on commercial activity on Indian reservations. In both cases, this Court found that state authority over non-Indian activity on the Reservation had been preempted by federal law, and provided a clear identification of the interests to be considered in the preemption analysis.

In *White Mountain*, this Court found that Arizona's application of motor carrier license and use fuel taxes to a non-Indian logging company had been preempted by federal law. The Court found that the federal regulatory program and federal policy guaranteeing Indians the benefit from the natural resources on their reservation would be threatened by imposition of the state tax. *Id.* at 136, 149. The Court found that "state authority over non-Indians acting on tribal reservations is preempted even though Congress has offered no explicit statement on the subject." *Id.* at 151.

In *Ramah Navajo School Board v. Bureau of Revenue*, 102 S. Ct. 3394 (1982), this Court considered New Mexico's attempt to impose its gross receipts tax on a non-Indian construction company's receipts from construction of a school for Indian children on the Reservation. This Court stated that the preemption inquiry is not dependent on mechanical conceptions of state or tribal sovereignty, but calls for "a particularized inquiry into the relevant state, federal and tribal interests," an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. *Id.*, 102 S. Ct. at 3399. This examination is not controlled by standards of preemption developed in other areas, but is informed by the traditional notions of tribal sovereignty and by federal recognition and encouragement of sovereignty through promotion of tribal independence and economic development. *Id.* Recognition of Indian sovereignty and tribal independence in the preemption analysis is essential in order to reconcile the emphasis on the pervasiveness of federal regulation with the federal policy of encouraging Indian self-determination. *Id.*, 102 S. Ct. at 3403. The flexibility of this approach was found to provide sufficient guidance to state courts in regard to on-reservation activities, so long as the courts construe federal statutes and regulations generously "in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Id.* (quoting *White Mountain*, 448 U. S. at 144.) A particularized examination of the interests involved here demonstrates federal preemption of state regulation.

B. A Particularized Examination Of All Relevant Interests Compels A Finding That State Jurisdiction Has Been Preempted By Federal Law.

1. Tribal And Federal Interests Are Great While The State Has No Significant Interest In The Regulation Of Reservation Wildlife Resources.

Tribal access to and control of wildlife resources are among the most important of the rights reserved by Indian tribes. This Court has characterized tribal fishing rights as fundamental:

> The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed.

United States v. Winans, 198 U. S. 371, 381 (1905).

As a basic proposition it is clear that Indians traditionally enjoyed the exclusive right to hunt and fish on lands reserved to them. *Menominee Tribe v. United States*, 391 U. S. 404 (1968). Since the Treaty of July 1, 1852 was "not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted," the Tribe reserved its right to exclusive control of hunting and fishing on its lands, although the Treaty does not specifically mention the right. *United States v. Winans*, 198 U. S. 371, 381 (1905); *Menominee Tribe v. United States*, 391 U. S. 404 (1968). The Tribe's sovereign powers are not affected by the subsequent designation of boundaries through Executive Order. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130, 133-34 n. 1 (1982).

Tribal hunting and fishing rights are a part of established tribal rights to full use and enjoyment of the reservation and the fruits of the land, and entitlement to sufficient resources to make the reservation capable of producing a moderate standard of living. *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658 (1979); *Arizona v. California*, 373 U. S. 546 (1963); *Shoshone Tribe v. United States*, 299 U. S. 476 (1937).[3] This Court has repeatedly

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[3]Congress has compensated Indians for the loss of valuable hunting and fishing rights. *See* 13 Stat. 324 (1864) ($5,000 compensation for off-reservation hunting and fishing rights); *Whitefoot v. United States*, 293 F. 2d 658, 660 (Ct. Cl. 1961), *cert. denied*, 369 U. S. 818 (1962) ($15,000.00 for loss of fishing

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extended protection to these rights down to the present day. *Washington v. Fishing Vessel Ass'n.*, 443 U. S. 658 (1979); *Antoine v. Washington*, 420 U. S. 194 (1975).

Contrary to the State's assertions, tribal control over wildlife resources on tribal land has been the traditional assumption. In his authoritative text on Indian law, Felix Cohen cited approvingly a number of cases and Interior Department opinions holding that state regulation of reservation fishing rights was contrary to law. F. Cohen, *Handbook of Federal Indian Law* 285 (1942). *See State v. Johnson*, 212 Wis. 301, 249 N. W. 285, 288 (1933) (state game and fish laws not applicable to trust lands); *I Op. Sol. I. D.* 652 (M 28107, June 30, 1936) (wildlife resources on tribal land not subject to state regulation); *I Op. Sol. I. D.* 202 (M 24358, May 14, 1928) (state could not regulate boating or fishing on tribal lands).[4] Congress has provided criminal sanctions for hunting and fishing on Indian lands without tribal permission. 18 U. S. C. 1165. And, in enacting Public Law 280, 67 Stat. 590 (1953), Congress specifically protected the tribes from deprivation of rights with respect to "hunting, trapping or fishing, or the control, licensing or regulating thereof." 25 U. S. C. Sec. 1321 (b).

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privileges caused by dam construction). This Court has recognized that hunting and fishing rights are a compensable interest under the Fifth Amendment. *Menominee Tribe v. United States*, 391 U. S. 404 (1968).

[4]In addition to the opinions cited by Cohen, *see also* I Op. Sol. I. D. 702 (M 28568, December 11, 1936) (state may not enter reservation to enforce state game law); I Op. Sol. I. D. 975 (M 30920, September 4, 1940) (application of state game laws forbidden as interference with interests of the tribe and federal government); II Op. Sol. I. D. 1185 (M 31480, February 12, 1943) (power of tribe to regulate non-Indian hunting and fishing is "undoubted" and exclusive on non-ceded tribal lands); II Op. Sol. I. D. 2062, 2069-70 (June 3, 1974) (state regulation of boating and fishing invalid if in conflict with tribal regulation). An opinion to the contrary, cited by Petitioners, has been withdrawn (Pet. Br. at 21 n. 10).

Petitioners' claim that state authority has been "uniformly recognized" is a blatant misstatement. Pet. Br. at 21. Traditionally, little non-Indian fishing and hunting occurred on tribal lands. The issue, therefore, was usually whether the state could regulate Indian fishing and hunting, and state jurisdiction was uniformly denied. *See, e. g., United States v. Hamilton*, 233 F. 685 (W. D. N. Y. 1915); *In re Linco'n*, 129 F. 247 (N. D. Cal. 1904); *In re Blackbird*, 109 F. 139 (W. D. Wis. 1901).

Recent decisions continue to recognize tribal authority over reservation wildlife resources. In *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Comm'n*, 588 F. 2d 75 (4th Cir. 1978), the federal government and the Tribe had created an integrated scheme for the development of reservation fishing. The Fourth Circuit found that the State could not require a license for on-reservation fishing because the Tribe and the federal government had preempted the field and state licensing would infringe upon the tribal right of self-government. In *White Mountain Apache Tribe v. State of Arizona*, 649 F. 2d 1274 (9th Cir. 1981), the court affirmed the grant to the Colville Tribes of a preliminary injunction preventing the exercise of state authority over non-Indian fishing on the Reservation, and remanded to the District Court a similar claim on behalf of the White Mountain Apache Tribe, for consideration of the relevant federal, tribal and state interests. Where the Tribe has accommodated itself to state regulation, however, no preemption or infringement has been found. *United States v. Montana*, 604 F. 2d 1162 (9th Cir. 1979), *rev'd on other grounds*, 450 U. S. 544 (1981); *United States v. Sanford*, 547 F. 2d 1085 (9th Cir. 1976).[5]

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[5]Where courts have found dual state regulations permissible, the inherent conflict has sometimes led to absurdly inconsistent results. *See, e. g., California v. Quechan Tribe*, 424 F. Supp. 969 (S. D. Cal. 1977), *rev'd on other grounds*, 595 F. 2d 1153 (9th Cir. 1979) (state had limited right to regulate, but no

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Tribal regulatory jurisdiction derives from the Tribe's general authority, as sovereign, to control activity within its jurisdiction and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in activities within that jurisdiction. *Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130, 137 (1981). Tribes retain the inherent power necessary to tribal self-government and territorial management. *Id.* at 141. Tribal regulatory jurisdiction is a part of the "broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest. . . ." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 152-153 (1980). Tribal regulatory jurisdiction over non-Indian hunting and fishing on reservation lands has been recognized by the Court and conceded by the State. *Montana v. United States*, 450 U. S. 544, 557 (1981). Pet. Br. at 39, 42.

The decision of the Tenth Circuit is entirely consistent with the scope of tribal sovereignty established by this Court in *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191 (1978) and *United States v. Wheeler*, 435 U. S. 313 (1978). Those cases do not establish an unqualified general proposition that tribal sovereign powers do not extend to nonmembers. In *Oliphant*, this Court ruled only that Indian tribes could not exercise criminal jurisdiction over non-Indians, as a necessary implication of their dependent status on the federal government. In *Wheeler*, this Court held that tribal power to punish tribal offenders is an aspect of retained sovereignty, and reiterated that "until Congress acts, the tribes retain their existing sovereign powers." 435 U. S. at 323.

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right of enforcement on the Reservation), *Donahue v. California Justice Court for Klamath Trinity Judicial District*, 15 Cal. App. 3d 557, 93 Cal. Rptr. 310 (Ct. App. 1971) (state had regulatory jurisdiction over fish and game, but tribal permission was a complete defense to charge of violation of state law).

In *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980), this Court upheld tribal power to tax non-tribal members. This Court sharply distinguished the case from *Oliphant*, noting that tribal authority over activities taking place "on Indian lands, in cases where the Tribe has a significant interest in the subject matter, was very probably one of the tribal powers under 'existing law' confirmed by Sec. 16 of the Indian Reorganization Act of 1934, 48 Stat. 987, 25 U. S. C. Sec. 476." *Id.* at 153. This Court restated an enduring principle of federal Indian law: "Tribal powers are not implicitly divested by virtue of the tribes' dependent status. This Court has found such a divestiture in cases where the exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government. . . ." *Id.* (citing *Wheeler* and *Oliphant*). Thus, unless the State can show that the regulatory power of the Mescalero Apache Tribe is inconsistent with an overriding federal interest, the inherent power is retained. The fact that the tribal exercise of power conflicts with state power will not cause a divestiture. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Colville*, 447 U. S. at 154. *See also Confederated Salish and Kootenai Tribes v. Namen*, 665 F. 2d 951, 962-65 (9th Cir. 1982) (tribes retained inherent power to regulate non-Indian use of riparian tribal trust land). In *Montana*, this Court affirmed that tribes retain the powers necessary either to protect tribal self-government or to control internal relations, including some forms of civil jurisdiction over non-Indians. 450 U. S. at 564-65.

The State asserts that the right reserved by the Tribe is "a right to hunt and fish free of state law," and not the sovereign power to manage wildlife. Pet. Br. at 20. The two rights are inseparable parts, however, of the sovereign right of access to and control of reservation resources. Wildlife law is basically resource management. *See Hughes v. Oklahoma*, 441 U. S. 322 (1979); *Baldwin v. Fish and Game Comm'n*, 436 U. S. 371 (1978). The State

further asserts that the source of the Tribe's general powers of wildlife management is its status as a landowner. Pet. Br. at 42. The Tribe's power does not spring from its status as landowner, but is an essential instrument of self-government and territorial management. *Merrion*, 455 U. S. at 137.

The State further attempts to limit the Tribe's hunting and fishing rights to "food for basic survival" and "the maintenance of traditional ways." Pet. Br. at 40. The State makes the argument that reservation resources may not be used to provide tribal revenues. *Id.* This startling conclusion is, of course, at odds with the entire history of federal Indian law and the policy of tribal self-determination. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U. S. 130 (1982); *Arizona v. California*, 373 U. S. 546 (1963); *United States v. Shoshone Tribe*, 304 U. S. 111 (1938); *Indian Reorganization Act of 1934*, 48 Stat. 984, 25 U.S. C. Sec. 461 *et. seq.*

This case represents the first time a state has come before this Court and asserted broad civil regulatory jurisdiction over tribal lands, which is not based on a federal statute. This claim violates the general principle that state civil regulatory authority may not be extended to tribal lands in the absence of congressional authorization. *Bryan v. Itasca County*, 426 U. S. 373 (1976). In *Bryan*, this Court stated that the imposition of state regulation on reservations might result "in the undermining or destruction of such tribal governments as did exist and a conversion of the affected tribes into little more than private, voluntary organizations." *Id.* at 388.[6]

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[6] *See also Seminole Tribe of Florida v. Butterworth*, 658 F. 2d 310 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1717 (1982) (state gambling laws not applied to reservation under P. L. 280); *United States v. New Mexico*, 590 F. 2d 323 (10th Cir. 1978), *cert. denied*, 444 U. S. 832 (1979) (state licensing of liquor sales on reservation not authorized under 18 U. S. C. Sec. 1161); *Santa Rosa Band of Indians v. Kings County*, 532 F. 2d 655 (9th Cir. 1975); *cert. denied*, 429 U. S. 1038 (1977) (county had no jurisdiction to enforce zoning ordinances on reservation under P. L. 280).

This is not a case where the State is attempting to impose a dual system of taxation, which may present no direct conflict. *Colville*, 447 U. S. at 158. The regulatory authority which the State asserts over a reservation resource in this case is inherently incompatible with the federally-sanctioned tribal regulatory scheme already in place. The assertion of state regulatory jurisdiction involves not only the intrusion of state power on reservation lands, but a corresponding diminishment of tribal power. *Bryan v. Itasca County*, 426 U. S. 373, 388 (1976). The concept of inherent tribal sovereignty therefore assumes enhanced importance, as divestiture of such sovereign powers may only be accomplished by federal action.

In view of the above considerations, the Tenth Circuit properly assigned the concept of sovereignty "a leading role on the litigational stage."[7] Contrary to the State's charges, the Tenth Circuit's treatment of tribal sovereignty is neither "startling" nor "novel and enlarged." Pet. Br. at 9. Good sense requires that, as matters of vital tribal concern are involved, tribal sovereignty will be weighed more heavily in the "particularized examination" required by this Court. *White Mountain, supra.* Where the Tribe as sovereign has a substantial interest, state authority is generally preempted by federal law. *White Mountain, supra; Ramah, supra.*

The Tribe, as sovereign, has a duty to regulate and protect wildlife for the common benefit of all its people. Pet. App. at 29a; *Mason v. Sams*, 5 F. 2d 255 (W. D. Wash. 1925) (tribe owns fish and game on reservation). The

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[7]Pet. App. at 16a. The Tenth Circuit did not find preemption by reason of sovereignty alone, as the State implies in its formulation of "Questions Presented", (Pet. Br. at i), nor did the Tenth Circuit treat sovereignty as an "independent, substantive principle of law . . . having preemptive effect", as the State alleges. Pet. Br. at 6. The Tenth Circuit expressly stated that it found it unnecessary to consider whether the Tribe's sovereign powers alone were sufficient to oust state jurisdiction, because of the strong basis for federal preemption. Pet. App. at 21a.

Tribal Council is specifically empowered to protect and preserve the wildlife and natural resources of the Tribe. Pet. App. at 22a-23a. The Tribe has committed its funds, personnel and resources to the establishment of the tribal hunting and fishing enterprise and the creation of a comprehensive wildlife management system, with the encouragement and assistance of the federal government. Non-Indian involvement is a subsidiary issue in this case. The real issue is who is to have control over and derive the profit from a valuable tribal resource created almost entirely by the Tribe and the federal government, where tribal management, the State concedes, has had no adverse impact on state conservation interests.

The Tenth Circuit's treatment of sovereignty is in complete accord with the most recent statements of this Court in *Ramah Navajo School Board v. Bureau of Revenue*, 102 S. Ct. 3394 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U. S. 136 (1980). In both cases, the starting point of this Court's analysis was the right of tribal self-government and broad federal power to regulate tribal affairs under the Indian Commerce Clause. *Ramah*, 102 S. Ct. at 3398; *White Mountain*, 448 U. S. at 142. This Court identified as the *guiding principle* in the preemption analysis the rule that federal law must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Ramah*, 102 S. Ct. at 3403. In *Ramah*, this Court admonished the courts below for their failure to give full deference to this principle. The Tenth Circuit's opinion in this case correctly applied this "guiding principle," which is entitled to even greater weight because the subject of regulation is a reservation resource, and because this case involves a conflict between dual regulatory systems.

This is not a case like *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134 (1980), where the Court held that tribal taxation did not oust a state from power to tax on-reservation purchases

of cigarettes by non-members of the Tribe, but noted that "[i]t is painfully apparent that the value marketed by the smokeshops to persons coming from outside is not generated on the reservations by activities in which the Tribes have a significant interest." *Id.* at 155. Here, the value is almost entirely the result of tribal and federal effort. All of the waters on the Reservation are stocked by the National Fish Hatchery located on the Reservation. The elk herd is a direct result of tribal and federal efforts. Because of tribal range development, the elk herd has flourished and has benefited off-reservation elk hunting. The antelope are nonmigratory and seldom, if ever, leave the Reservation. Only the deer, bear and elk wander on and off the Reservation and the State concedes that tribal conservation efforts have been consistent with good management and have no adverse impact off the Reservation. The implication of the holding in *Colville* is that the Indian Commerce Clause would invalidate state taxes (and here regulation) where value generated on the reservation is at issue. This is in accord with the Court's characterization of the Indian Commerce Clause in *Merrion*, 455 U.S. at 153-54: "To date, . . . this Court has relied on the Indian Commerce Clause as a shield to protect Indian tribes from state and local interference. . . ."

The Tenth Circuit opinion in this case is consistent with the opinion of this Court in *Montana v. United States*, 450 U.S. 544 (1981). The *Montana* case presented the question of tribal power to interfere with non-Indians' enjoyment of their own lands, in a context where tribal interest was minimal. This Court expressly stated that the issue in *Montana* was a narrow one; ". . . the question of the power of the Tribe to regulate non-Indian fishing and hunting on reservation land owned in fee by nonmembers of the Tribe." *Id.* at 557. In contrast, this case concerns New Mexico's claim to broad regulatory power over "the management and harvesting of wildlife resources within the boundaries of the Mescalero Apache reservation." Pet. App. at 10a.

The State's attempt to characterize the tribal ownership of the land as "insignificant" is untenable and at odds with the established views of this Court, which has consistently guarded the authority of Indian governments over their reservations. *United States v. Mazurie*, 419 U. S. 544, 558 (1975). In *White Mountain*, 448 U. S. 136, this Court stated:

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the Reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

Id. at 151.

The ownership of the land was the critical factor in *Montana*.[8] The only two sources alleged for preemptive effect were the Crow treaties and 18 U. S. C. Sec. 1165. The treaties were construed by this Court in light of subsequent allotment of the reservation land and held not preemptive. 18 U. S. C. Sec. 1165 was held to apply only to tribal land. Here, the tribal lands of the Mescalero Apache Tribe have never been alienated, so the Treaty retains preemptive force, and 18 U. S. C. Sec. 1165 does, of course, apply to augment the Tribe's regulatory powers. Most significant, however, the *Montana* case contains an affirmation of the Tribe's sovereignty over its own territory and over non-Indian activity based on consensual arrangement or affecting the political integrity, economic security or the health and welfare of the Tribe. 450 U. S. at 565-66.

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[8]The contrast in patterns of land ownership on the Crow Reservation and on the Mescalero Apache Reservation is striking. The Crow Reservation contains only 17 percent land held by the United States in trust for the Tribe, 1 percent owned by the United States, 52 percent owned in fee by Indians, and 28 percent fee land owned by non-Indians. The Mescalero Apache Reservation, on the other hand, is virtually completely tribal trust land. Only a negligible 185 acres is owned in fee.

This case in fact presents the obverse of the question presented in *Montana*. The issue here is whether the State can regulate and prohibit, either directly or through restrictive regulations, hunting and fishing on *tribal* land. In *Montana*, this Court construed this issue of the ownership of the land as "a substantial part of their claim" and affirmed the power of the Tribe to control non-Indian hunting and fishing on its own lands. *Id.* at 550, 557. The same logic which dictates exclusive state jurisdiction over non-Indian lands dictates exclusive tribal jurisdiction over tribal lands.

In *Montana*, the Tribe's interest focused on sport hunting and fishing on a navigable river, owned and stocked by the State. There was no evidence of substantial tribal or federal development and management of fish and game, and no evidence that hunting and fishing contributed substantially to the economy of the Tribe. The Tribe had accommodated itself to the nearly exclusive state jurisdiction over the land involved.

In contrast, the Mescalero Apache Tribe operates a reservation-wide hunting and fishing program, including fishing and big game hunting of elk, deer, bear, and antelope. The Mescalero Apache Tribe has an extensive program of game and fish management, carried on with extensive federal assistance, including federal approval of all tribal ordinances. The reservation wildlife resource is a creation of the Tribe and the federal government. Hunting and fishing are important sources of income to the Tribe, both directly and indirectly as a stimulant to the tourism program. The revenues are used for governmental purposes and tribal economic development. Tribal management has been exemplary and there have been no harmful effects off the Reservation. State officers have not entered the Reservation to enforce state law since 1969.

The State of New Mexico performs no services justifying any interference with the Tribe's program. There is no legitimate reason for the State to be allowed to impose its license fee or substantive regulations. What this

Court said in *White Mountain*, 448 U.S. 136, is equally applicable here:

> Respondents (state officials) have been unable to identify any regulatory function or service performed by the State that would justify the assessment of taxes for activities . . . within the Reservation. . . . They refer to a general desire to raise revenue, but we are unable to discern a responsibility or service that justifies the assertion of taxes imposed for on-reservation operations. . . .

Id. at 148-49, 150. *See also, Ramah*, 102 S. Ct. 3394:

> Having declined to take any responsibility for the education of these Indian children, the State is precluded from imposing an additional burden on the comprehensive federal scheme intended to provide this education—a scheme which has "left the State with no duties or responsibilities."

Id. at 3401.

The State makes an attempt to justify its regulation by its general research into fish and wildlife programs. Pet. Br. at 47. Such general activities, even if arguably beneficial to the Tribe, cannot expand the State's jurisdiction on the Mescalero Apache Reservation any more than it could justify an intrusion in a neighboring state. The State interest in state-wide air and water quality standards is likewise insufficient. As stated by the Tenth Circuit, the interests asserted by the State are also held by the Tribe as sovereign. Pet. App. at 29a. The State has no monopoly on environmental concerns.

The State claims that it contributes to the hunting and fishing program through provision of access roads and fire suppression services throughout the State. In *Ramah*, this Court specifically rejected a similar claim, holding that provision of off-reservation services is not a sufficient interest to justify the intrusive effect of state jurisdiction. *Ramah*, 102 S. Ct. at 3402 n. 9.

The State concedes that the tribal program maintains the fish and wildlife populations within the Reservation at levels consistent with good management and that there is

no adverse impact on fish and wildlife outside the Reservation. Res. App. at 35a. The only possible off-reservation effects are the benefits of increased hunting and fishing opportunities. The State can point to no interest in conservation which sustains its intrusive attempt to regulate a vital natural resource on an Indian reservation. Viewed in light of the interest-balancing analysis established by this Court, state jurisdiction has been preempted by federal law.

2. The Treaty, Federal Statutes, Federal Participation And Federal Policy Favoring Tribal Self-Determination Preempt The Application Of State Law.

There is no requirement of express preemptive intent to find that state authority over reservation affairs has been preempted. *White Mountain*, 448 U.S. 136 (1980). Rather, the task is to determine, after the particularized inquiry carried out above, "whether, in the specific context, the exercise of state authority would violate federal law." *Id.* at 145. The Tenth Circuit found six sources of federal preemption, which, when read with due consideration for tribal sovereignty, compel the conclusion that state authority is foreclosed: (a) the Tribe's Treaty of July, 1852, 10 Stat. 979; (b) the New Mexico Enabling Act, 36 Stat. 557 (1910); (c) the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 476 (IRA); (d) the Tribe's Constitution and ordinances enacted pursuant to the IRA; (e) the extensive federal development assistance; and (f) the negative inferences from P.L. 280, 67 Stat. 590. Pet. App. at 21a.

To these can be added the general federal statutes mentioned in *White Mountain*, which express a "firm federal policy of promoting tribal self-sufficiency and economic development." 448 U.S. at 143 n.10. Although not treated as an independent source of preemption by the Tenth Circuit, 18 U.S.C. Sec. 1165 is also a part of the preemptive federal scheme. This statute indicates federal intent to enforce tribal authority over hunting and

fishing on tribal lands. Finally, of course, underlying all of these is the Indian Commerce Clause which is the main source of the federal government's plenary authority over Indian affairs and which may, in itself, have a "role to play in preventing undue discrimination against, or burdens on Indian commerce." *Colville*, 447 U. S. at 157.

a. *The Treaty of July 1, 1852, 10 Stat. 979.* Article One of the Tribe's Treaty with the United States provides as follows:

> Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and *exclusively* under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit [*emphasis added*].

Article Nine of the same Treaty provides:

> . . . that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

The present boundaries were established by Executive Order in 1883.[9] The rights at issue here are not dependent on whether the Reservation was created by Executive Order or by treaty. *Merrion v. Jicarilla Apache Tribe*, 450 U. S. 130, 133 n. 1 (1982); Pet. App. at 17a.

A tribe reserves its right to control hunting and fishing in the area in which it resides whether or not such right is specifically mentioned in a treaty. *Menominee Tribe v. United States*, 391 U. S. 404 (1968); *United States v. Winans*, 198 U. S. 371 (1905). Indian treaties are to be

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[9]Since creation of the Tribe's Reservation was mandated by treaty, the Reservation is more than a traditional executive order reservation. *United States v. Santa Fe Pacific Railway Co.*, 314 U. S. 339, 346 at n. 4 (1940); Memo Sol. I. D. 961 (June 28, 1940) (Executive Orders merely fulfilled obligations toward the Mescalero Apache undertaken by the United States in the Treaty of July 1, 1852).

liberally construed in favor of the Indians. *Choctaw Nation v. United States*, 318 U. S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U. S. 665, 675 (1912). The Mescalero Treaty itself provides in Article 11 that "this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians."

The Mescalero Apache Reservation contains no allotments, and, except for a few acres, is entirely held in trust by the United States for the Mescalero Apache Tribe. This Court has stated that "treaty rights with respect to reservation lands must be read in light of the subsequent alienation of those lands." *Montana v. United States*, 450 U. S. at 561. This Court stated that "what is relevant . . . is the effect of the land alienation occasioned by that policy [allotment] on Indian treaty rights tied to Indian use and occupation of reservation land." 450 U. S. at 560 n. 9. Since the Mescalero Reservation was never subjected to the policy of allotment, its treaty rights have not been affected and it remains "exclusively under the laws, jurisdiction and government of the United States of America".[10]

b. *New Mexico Enabling Act, 36 Stat. 557.* Like most states other than the original thirteen colonies, New Mexico was permitted to join the Union by a federal statute that specified the terms of admission. The Federal Enabling Act for New Mexico, 36 Stat. 557 (1910), requires that the people of New Mexico:

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[10]The decision in *Mescalero Apache Tribe v. O'Cheskey*, 625 F. 2d 967 (10th Cir. 1980), *cert. denied*, 450 U. S. 959 (1981), has been invalidated by the decision in *Ramah, supra. O'Cheskey*, however, involved only a tax on a non-Indian contractor. In this case the State asks that it be allowed to physically enter the Reservation and impose a comprehensive regulatory scheme on an important reservation resource. The exclusivity of federal jurisdiction under the Treaty will not allow such intrusive state action.

(a) "forever disclaim all right and title" to all lands "owned or held by any Indian or Indian tribes . . . .", and

(b) agree and declare that "until the title of such Indian or Indian tribes shall have been extinguished, the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States."

36 Stat. 557, Sec. 2.

The plain meaning of the disclaimers is controlling in the absence of exceptional circumstances. *American Tobacco Co. v. Patterson*, 102 S. Ct. 1534, 1537 (1982). This Court has previously declined to give those disclaimers "an especially crabbed or restrictive meaning." *McClanahan v. Arizona Tax Comm'n*, 411 U. S. 164, 176 (1973). Congress required this disclaimer of jurisdiction over Indian lands in order to discharge this nation's solemn, pre-existing treaty obligations to the Indians.

The requirement of disclaimers is consistent with the long-standing federal policy of protection of Indian tribes through exclusive federal jurisdiction. "The policy of leaving Indians free from State jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U. S. 786, 789 (1945). The disclaimers have been consistently found effective in cases involving areas of significant tribal concern.[11] In *McClanahan v. Arizona State Tax Comm'n*, 411 U. S. 164 (1973), this Court relied on the disclaimer as evidence that the State lacked jurisdiction to impose its personal income tax on the Reservation. *See also Fisher v. District Court*, 424 U. S. 382, 386 n. 8 (1976); *Williams v. Lee*, 358 U. S. 217, 220-23 (1959); *Williams v.*

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[11] *Organized Village of Kake v. Egan*, 369 U. S. 60, 68 (1962), cited by Petitioners, has no application to the question whether the state may exercise authority in areas set aside by treaty for the exclusive use and control of Indians. *McClanahan v. Arizona Tax Comm'n*, 411 U. S. 164, 176 n. 15 (1973); *Chino v. Chino*, 90 N. M. 204, 561 P. 2d 476 (1977).

United States, 327 U.S. 711, 714 (1946).[12] Particularly where management of an important tribal resource is at issue, the exclusivity language of the Mescalero Treaty and the Enabling Act disclaimer are sufficient to preempt state regulation.

New Mexico's attempt to license and regulate hunting and fishing on the Mescalero Reservation is without jurisdictional basis, just as was its effort to impose its gross receipts tax on the non-Indian contractor in *Ramah*. The New Mexico gross receipts tax is a tax on the privilege of doing business in New Mexico. This Court noted that "New Mexico has not explained the source of its power to levy such a tax in this case where the 'privilege of doing business' on an Indian reservation is exclusively bestowed by the Federal Government". 102 S.Ct. at 3402. Here only the Tribe can grant the privilege of hunting or fishing on its Reservation, just as only the Navajo Tribe could grant the "privilege of doing business" on the Navajo Reservation. Only the Tribe, therefore, has power to license and regulate such hunting and fishing.

c. *The Indian Reorganization Act of 1934.* In *White Mountain*, this Court characterized the purpose of the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 461 as

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[12]As noted by the State, questions regarding the scope and meaning of state disclaimers are now pending before this Court. *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3217 (October 18, 1982); San Carlos Apache Tribe v. Arizona, 668 F.2d 1093 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3217 (Oct. 8, 1982). The pending cases involve, *inter alia*, a claim by the states involved that the disclaimers apply only to "proprietary" or ownership interests, and not to "governmental" or regulatory interests. The structure of the disclaimer requirement indicates the fallacy of this view. The states were required to *both* agree to the "absolute jurisdiction and control" of Congress, and, separately, to disclaim all right and title to Indian lands. The States' claim is also inconsistent with the treatment of the Enabling Acts by this Court and by Congress. *See, e.g., McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164 (1973); Public Law 280, Sec. 6, 67 Stat. 588 (removing legal impediment to assumption of state jurisdiction).

being "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." 448 U.S. at 143 n. 10, *citing Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). Pursuant to this Act, the Mescalero Apache Tribe adopted a federally-approved Constitution in 1936, and adopted a federally-approved Revised Constitution in 1965 (Jt. App. at 43a). The Constitution specifically recognizes the Tribal Council's authority to "protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation . . . ." (Jt. App. at 53a). Tribal hunting and fishing ordinances adopted pursuant to the Tribe's federally-approved Constitution implement the overriding federal policy expressed in the IRA.

d. *Tribal Ordinances.* The federally-approved hunting and fishing ordinances passed pursuant to the Tribe's Constitution are of two kinds. One is a permanent ordinance providing that no state license is required for any person hunting or fishing on the Reservation, requiring tribal licenses for all non-members and requiring conformance with Tribal Council regulations (Jt. App. at 74a). The other is an annual tribal ordinance which deals in great detail with every aspect of hunting or fishing on the Reservation (Jt. App. at 76a-91a).[13] These extensive regulations equal or surpass in comprehensiveness those

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[13]The tribal ordinances control the following: (1) the hours for hunting and fishing; (2) the types of ammunitition to be used on each type of big game, including caliber and bullet weight; (3) legal hunting areas within the Reservation; (4) whether dogs are allowed in a particular hunt; (5) whether guides are required; (6) where hunters and anglers are to check in and out; (7) sex and age of game to be hunted; (8) number of permits to be issued; (9) non-use of artificial light; (10) permit fees; (11) number of lines allowed per person; (12) use of boats and other flotation equipment; (13) littering and pollution; (14) regulation of campfires; (15) use of snags, nets, seines and other devices; and (16) civil penalties and forfeitures (Jt. App. at 76a-91a).

regulations involved in *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685 (1965); *White Mountain, supra;* or *Ramah, supra.*

Two cases decided by this Court have dealt with the issue of the preemptive effect of federally-approved tribal ordinances. In *Washington v. Confederated Tribes*, 447 U.S. 134, 156 (1980), this Court rejected a preemption argument based on adoption by a Tribe of a federally-approved cigarette taxing ordinance. That case, however, involved an attempt by the Tribe to market a tax exemption, which in no way represented value generated on the Reservation.

A different result was reached where important tribal interests were at stake. In *Fisher v. District Court*, 424 U.S. 382 (1976), a state court asserted jurisdiction over an adoption proceeding in which all parties were members of an Indian tribe. A tribal ordinance granted exclusive jurisdiction over such adoptions to the Tribal Court. In a *per curiam* opinion, this Court reversed, holding that the tribal ordinance did preempt the state jurisdiction and stating:

> The tribal ordinance conferring jurisdiction on The Tribal Court was authorized by Sec. 16 of the Indian Reorganization Act, 25 U.S.C. Sec. 476 [25 U.S.C.S. Sec. 476]. Consequently, it implements an overriding federal policy which is clearly adequate to defeat state jurisdiction over litigation involving reservation Indians. Accordingly, even if we assume that the Montana courts properly exercised adoption jurisdiction prior to the organization of the Tribe . . . that jurisdiction has now been preempted.

Id. at 390.

Fisher v. District Court, holds that when tribal ordinances go to the essence of tribal self-government, those ordinances carry preemptive power because they are necessary to implement the federal policy of revitalizing tribal government, expressed in the IRA and other federal statutes. This is a case chiefly concerned not with jurisdiction

over non-Indians, but with authority over management of tribal resources. This authority is crucial to tribal self-government. Therefore, the Mescalero Apache Tribe's ordinances directly implement the "overriding policy" of the Indian Reorganization Act and have preemptive effect. *See also United States v. Mazurie*, 419 U.S. 544 (1975).

e. *Federal Developmental Assistance.* Federal participation in the Tribe's hunting and fishing program is comprehensive. Federal efforts were largely responsible for the importation of 162 elk from Yellowstone National Park in order to build the Tribe's herd on the Reservation. A federal conservationist works on the Reservation full-time along with tribal conservation officers to ensure that seasons and bag limits are compatible with good conservation practices. Fishing on the Reservation is also a tribal-federal undertaking. The Reservation has no natural lakes, but has several man-made lakes, all constructed with federal funds. All reservation waters are stocked exclusively with fish from the National Fish Hatchery, located on reservation land leased to the Bureau of Sport Fisheries and Wildlife of the Department of the Interior. The hatchery is currently federally funded and operated pursuant to an agreement between the Tribe and the Bureau of Sport Fisheries and Wildlife. The agreement provides for federal technical assistance in the management and development of fishery resources in reservation waters. A fish biologist employed by the Bureau of Sport Fisheries and Wildlife recommends to the Tribal Council where and how many fish should be stocked within the Reservation, based upon periodic surveys of all Mescalero Apache Reservation fishing waters.

This pervasive federal involvement signifies two things. First, it demonstrates that state interest in the Tribe's hunting and fishing program is minimal or nonexistent. Second, the pervasive federal involvement is itself expressive of both a recognition of a lack of state authority and an intent by the federal government, in cooperation with the Tribe, to totally preempt the field. This

pervasive federal involvement has itself been viewed as sufficient to preempt state authority. In *Eastern Band of Cherokee Indians v. North Carolina Wildlife Resources Commission*, 588 F. 2d 75 (4th Cir. 1978), *cert. dismissed*, 446 U. S. 960 (1980), the federal government had subsidized the Tribe's sport fishing program for over a decade by stocking the waters on the Reservation, and by supplying personnel to assist in the program. The Court concluded that "the strong federal policy supporting the Band's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's reservation." *Id.* at 78.

f. *Public Law 280, As Amended.* Under Public Law 280, New Mexico could have assumed a degree of civil and criminal jurisdiction over the Mescalero Apache Reservation. New Mexico did not avail itself of that opportunity. The statute has since been amended to require tribal consent through an election process which must be strictly followed. *See* 25 U. S. C. Sec. 1321 and *Kennerly v. District Court of Montana*, 400 U. S. 423 (1971). This amendment itself is an expression of congressional intent to insulate tribes and their reservations from state control except where the Tribe desires state involvement. Even if the correct procedure is followed to obtain jurisdiction, the statute specifically protects the tribes from the deprivation of "any right, privilege, or immunity afforded under federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulating thereof." 25 U. S. C. Sec. 1321(b). The passage by Congress of a statute preserving an immunity has previously been taken by this Court as evidence of existence of the immunity. *See, e.g., McClanahan v. Arizona Tax Commission*, 411 U. S. 164 (1973) and the analysis of the Buck Act, 4 U. S. C. Sec. 105, *et seq.*

g. *18 U. S. C. Sec. 1165.* While not finding particular premptive effect in 18 U. S. C. Sec. 1165, the Tenth Circuit did nevertheless find it relevant. It is deserving of

more weight in the scale than it was accorded. It represents recognition by Congress of tribal authority to set terms and conditions for hunting and fishing on the Reservation and to provide a federal sanction for violation of those conditions. The statute provides for a criminal fine to be imposed on anyone hunting, fishing or trapping on tribal trust land without tribal permission. This Court has construed the statute as establishing tribal jurisdiction over hunting and fishing on tribal land. *Montana v. United States,* 450 U.S. at 561-62. The legislative history indicates that 18 U.S.C. Sec. 1165 was enacted to "fill a gap in the present law for the protection of [Indian] property. *Id.* at 562 n. 12, *citing* S. Rep. No. 1686, 86th Cong., 2d Sess. (1960). This indicates that Congress assumed that the States had no jurisdiction over hunting and fishing on tribal lands.

h. *Federal Policy.* This Court has recently identified the "guiding principle" in the preemption analysis: federal law must be "construed generously in order to comport with . . . traditional notions of [Indian] sovereignty and with the federal policy of encouraging tribal independence." *Ramah,* 102 S.Ct. at 3403 (quoting *White Mountain,* 448 U.S. at 144). There is a firm federal policy of encouraging tribes to revitalize their self government and to assume control over their business and economic affairs. *White Mountain,* 448 U.S. 136, 149 (1980); *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 151 (1973). This policy has found expression in a number of general federal statutes and implementing regulations. See *White Mountain,* 448 U.S. at 143, n. 10. The hunting and fishing ordinances of the Mescalero Apache Tribe are federally approved pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. Sec. 461 *et seq.,* whose purpose was to foster and encourage tribal self-government. In the Indian Financing Act of 1974, 25 U.S.C. Sec. 1451 *et seq.,* Congress states:

> It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will

> *fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts* comparable to that enjoyed by non-Indians in neighboring communities.

[*Emphasis added*].[14]

The most recent expression of federal policy is the Statement by the President dated January 24, 1983, released from the White House Office of the Press Secretary, 19 Weekly Compilation of Presidential Document, and attached hereto as an appendix. The President reaffirmed the course of current federal policy:

> This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

In his Statement, the President emphasized the "government to government" relationship of the United States with Indian tribes and reaffirmed the federal commitment to foster and encourage tribal self government through continuation of the federal trust responsibility. The President listed as a major tribal government function "developing and managing tribal resources." Listing natural resources such as timber, fishing and energy as avenues of development for tribes, the President stated that "[t]ribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources." This expression of federal intent is consistent with the policy underlying federal legislation for the past several decades.

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[14] *See also*, the Indian Self-Determination and Education Assistance Act of 1975, 25 U. S. C. Sec. 450, *et seq.*, which expresses similar policies, and the congressional finding in the Indian Child Welfare Act, 25 U. S. C. Sec. 1901, *et seq.* "that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources. . . . "

The imposition of state regulation would render much of the tribal scheme a nullity. The State would hold within its power the ability to eliminate or greatly reduce hunting and fishing on the Reservation if it set seasons which did not overlap at all or which overlap only to a small extent. These decisions could be made for purely arbitrary reasons or because of disagreement with the Tribe over what constitutes good conservation. Some state regulations are completely unrelated to any conservation goal (Jt. App. at 206a). The State must prove that a measure is necessary for conservation before it can interfere with off-reservation Indian fishing rights. *Washington Department of Game v. Puyallup Tribe,* 441 U. S. 44 (1973). Certainly the burden should not be reversed where on-reservation resources are involved.

The State is attempting to regulate a resource which would not exist but for federal and tribal efforts. The Tribe's efforts would do nothing more than subsidize the State. The State's imposition of an additional licensing fee limits the Tribe's ability to raise the cost of its own licenses (Pet. App. at 14a). This obstructs the federal objective of guaranteeing Indians that they will receive the benefits of reservation resources. *White Mountain,* 448 U. S. at 149. A decision in favor of the State here would send an unmistakable message to Indian tribes: Do not bother with self-determination because the states will stand by ready to reap the benefit of your productive labor and reservation resources. In accordance with federal policy, the responsibilities and benefits from the reservation wildlife resource should be reserved for the Tribe.

II. State Regulation Of Wildlife Resources Within The Mescalero Apache Reservation Is An Impermissible Interference With Tribal Self-Government.

A. The Tribe And The Federal Government Have Exclusive Jurisdiction Over The Regulation Of Wildlife Resources On The Reservation.

The State of New Mexico has presented to this Court a claim to regulate the management and harvesting of wild-

life resources on Indian land. The State's claim to regulatory authority is not based on any federal statute, as in other cases presented to this Court. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976); *Rehner v. Rice*, 678 F. 2d 1340 (9th Cir. 1982), *cert. granted, Rice v. Rehner*, — U.S. — (No. 82-401, October Term, 1982). Instead, the State asserts regulatory authority over resources on an Indian reservation based solely upon its police powers and a theory of "trusteeship." Pet. Br. at 22. This case represents the first instance of such a general claim to state regulatory power over Indian land to come before this Court since 1832. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

In such a case, the burden is on the State to show a basis for such jurisdiction. Although ample grounds exist for a finding of preemption by federal law (see Part I, *supra*), that analysis is not necessary in this case. This case is controlled by the principles of *Worcester v. Georgia*, and its constitutional foundations. The most basic principle of Indian law, which has survived for more than one hundred fifty years, is the principle that "those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished." *United States v. Wheeler*, 435 U.S. 313, 322 (1977), quoting F. Cohen, *Handbook of Federal Indian Law* 122 (1945). In *Worcester*, the State of Georgia had imprisoned a white man living among the Cherokees with the consent of the tribal authorities. This Court held that the imprisonment was a violation of the Constitution, and that Indian tribes were subjects of federal law, to the exclusion of state law, entitled to exercise their own inherent rights of sovereignty unless inconsistent with federal law.

This principle has been modified in cases where the Indian tribe has no interest in the subject of the jurisdiction, or only a contrived interest. *United States v. McBratney*, 104 U.S. 621 (1882); *Washington v. Confeder-*

ated Tribes, 447 U. S. 134 (1980). The principles may also be inapplicable in regard to regulation of activities on non-Indian land. *Montana v. United States,* 450 U. S. 544 (1981). *But see Settler v. Lameer,* 507 F. 2d 231 (9th Cir. 1974) (tribe has inherent power to regulate off-reservation fishing). The principle excepts those cases in which the exercise of power by Indian tribes is inconsistent with their status of dependency on the federal government and their acceptance of its protection. *Oliphant v. Suquamish Indian Tribe,* 435 U. S. 191 (1978).

The principle remains, however, in its essential form: "[until] Congress acts, the tribes retain their existing sovereign powers." *United States v. Wheeler,* 435 U. S. 313, 323 (1978). Fundamental attributes of inherent sovereignty remain unless expressly divested by federal law or inconsistent with an overriding interest of the federal government. *Washington v. Confederated Tribes,* 447 U. S. 134, 153 (1980). Even where a State's interests are implicated, inherent sovereignty remains in the absence of federal divestiture. "[I]t must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States." *Id.* at 154.

This case involves regulation of fish and game resources on tribal land. The ancient and immemorial right of Indian tribes to access and control of hunting and fishing on their lands has been universally recognized. *See* Part I-A, *supra.*[15]

This case represents the latest in the continual succession of state attempts to undermine and artifically limit the core of the inherent sovereignty doctrine. The acknowledgement of this doctrine has not been a matter of lip

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[15]Whether wildlife is tribal "property" in a strict legal sense is not at issue. The State concedes that it does not "own" the wildlife within its borders. Pet. Br. at 22. The State reaches the remarkable conclusion, however, that while wildlife within its borders is a state "resource", *Id.* at 22, wildlife within the Reservation is not a tribal resource. *Id.* at 38. This conclusion is absurd on its face. Like the states, the Tribe has a "special interest in regulating and preserving wildlife for the benefit of [its] people." *Id.* at 22.

service to an outmoded theory, but has been administered by the federal courts with a spirit of sympathy and respect proper to the laws of a sovereign state. F. Cohen, *Handbook of Federal Indian Law*, 125 (1945); *United States v. Wheeler*, 435 U.S. 313 (1978).

This Court recently rejected an argument which limited tribal sovereignty to the powers of a landowner, *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). Upholding the tribal power to impose a tax on lands under lease to non-Indians, this Court held that the power to tax did not derive solely from the power to exclude non-Indians from tribal lands, but was an "essential instrument of self-government and territorial management." *Id.* at 139, 141. The Court reaffirmed that Indian tribes are "domestic, dependent nations" entitled to the tools for raising revenue necessary to cover the cost of government. *Id.* at 141. In *Merrion*, this Court preserved the broad tradition of sovereignty which was established in *Worcester v. Georgia*, *supra*, stating that the power to tax "derives from the tribe's general authority, as sovereign to control economic activity within its jurisdiction, and to defray the cost of providing governmental services by requiring contributions from persons or enterprises engaged in economic activities within that jurisdiction." 455 U.S. at 137.

The Tribe's power to regulate wildlife resources on its reservation is an essential attribute of its general authority as sovereign. The interest regulated is clearly a value generated on the Reservation. The hunter or angler avails himself of the privilege of hunting or fishing on the Reservation and is the recipient of extensive tribal services in the form of tribal conservation activities, wildlife management services, tribal guides, and ancillary recreational benefits. Clearly, the Tribe's sovereign authority enables it to act to protect the health, safety and welfare of its members. The Tribe has both an economic interest in the regulation and a general governmental interest in regulation for the conservation of tribal resources. The Tenth

Circuit reached the only possible conclusion on this issue: "In regulating game on the Reservation, the Tribe thus seeks to exercise its sovereign power in an area in which it unquestionably has a 'significant interest'." Pet. App. at 19a. Because of the direct effect of non-member hunting and fishing on the reservation resources, the Tribe's interest in regulating the activity cannot be seriously questioned.

Where the Tribe, as sovereign, has a significant interest which is not subject to an overriding federal interest, and the activity occurs on tribal lands, its sovereign authority is exclusive. This is the core of the sovereignty doctrine which this Court has preserved since *Worcester v. Georgia,* 31 U. S. (6th Pet.) 515 (1832). Indeed, the factual situation is very close to that of *Worcester.* Both cases involve non-Indian activity sanctioned by the Tribe. In both cases a state asserts the right to limit or control the non-Indian activity on tribal land. In neither case had the federal government acted to divest tribal autonomy nor to grant state jurisdiction. In such a situation the Tribe's authority is exclusive.

It is clear that the State of New Mexico is attempting to regulate in an area of significant tribal concern on tribal lands. Vital tribal resources such as fish and game should receive at least the same protection as Indian personal property or income earned on the Reservation. Although such state intrusions are also prohibited under the preemption analysis (See Part I, *supra*), the interference with tribal self-government forms an independent barrier. *White Mountain, supra.* This is so because . . . Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate such an immunity and allow states to treat Indians as part of the general community." *Oklahoma Tax Comm'n v. United States,* 319 U. S. 598, 613-14 (1943).

B. Dual Regulation Of Reservation Wildlife Resources Presents An Inherent Conflict Which Is An Impermissible Interference With Tribal Self-Government.

Tribal resources must be protected from state regulatory authority, or tribes may be reduced to no more than private, voluntary organizations. *United States v. Mazurie*, 419 U.S. 544 (1975). It is not sufficient that the tribes retain the right to enact more restrictive rules than the states under systems of concurrent jurisdiction. Any private landowner could do as much. If the doctrine of inherent sovereignty is to retain any meaning, tribes must be affirmed in their rights to control the exploitation and management of tribal resources. The exercise of state authority is necessarily infringement upon the sovereign authority of the tribe.

In *Bryan v. Itasca County*, 426 U.S. 373 (1976), the State of Minnesota asserted general regulatory authority over a reservation and cited Public Law 280 as the source of its authority. This Court found that Public Law 280 was not a grant of regulatory authority over Indian lands. This Court found it unnecessary to engage in a preemption or infringement analysis, since no federal law delegated regulatory jurisdiction to the state. This Court further noted the danger that imposition of state regulatory schemes on Indian reservations might undermine or destroy existing tribal governments. *Id.* at 388.[16]

The interference with tribal self-government that would result from allowing the State concurrent jurisdiction to regulate the Tribe's resources would clearly violate the standard established in *Williams v. Lee*, 358 U.S. 217

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[16]On the devasting impact on tribal governments of state regulatory control, see *Santa Rose Band of Indians v. Kings County*, 532 F. 2d 655, 662-63, 666-68 (9th Cir. 1975); Goldberg, *Public Law 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 U.C.L.A. Rev. 535 (1975); *Note, The Extension of County Jurisdiction Over Indian Reservations In California: Public Law 280 and the Ninth Circuit*, 25 Hastings L.J. 1451 (1974); Comment, *Indian Taxation: Underlying Policies and Present Problems*, 59 California L. Rev. 1261 (1971).

(1959), in which this Court held that tribal courts had exclusive jurisdiction over a civil action brought by a non-Indian against an Indian to recover on a debt incurred on a Reservation. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* at 220. This Court held that state jurisdiction would "undermine the authority of the tribal courts over reservation affairs and hence would infringe on the right of the Indians to govern themselves." *Id.* at 223. Certainly, regulation of reservation wildlife resources is also a part of "reservation affairs." The involvement of a non-Indian does not change the result: "It is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.*

This Court has held that the infringement test, like the preemption analysis, requires "an accommodation between the interests of the Tribe and the Federal Government, on the one hand, and those of the State, on the other." *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U. S. 134, 156 (1980). This Court identified the relevant considerations in *Colville*:

> While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities involving the Tribes and when the taxpayer is the recipient of tribal services. The State also has a legitimate governmental interest in raising revenues, and that interest is likewise strongest when the tax is directed at off-reservation value and when the taxpayer is the recipient of state services.

447 U. S. at 156-57.

The Tenth Circuit applied the *Colville* balancing process to this case and found that the scales "tipped decisively" in the Tribe's favor. Pet. App. at 25a. The court found that:

> Unlike *Colville*, we here have a clear state interference with a traditional tribal regulatory power. To restrict the application of the tribal scheme to members only would be to complicate excessively the enforcement process and to render the very idea of "regulation" an absurdity. Here the Tribe has, with the aid of the federal government, generated the "value . . . on the reservation" which it now seeks to control and whose benefits it seeks to enjoy. The state services received by on-reservation sportsmen are minimal —incidental spillover effects of state activities outside the reservation. In fact, the spillover benefits to the State from the tribal conservation scheme, *e.g.*, development of the migratory elk herd—may well be more significant. Although New Mexico has a legitimate interest in the conservation of its wildlife, the Tribe's activities do not threaten that interest in any way.

Pet. App. at 26a-27a.

The economic importance to the Tribe of its hunting and fishing program is also a significant factor in finding infringement upon tribal self-government (*Id.* at 27a), as is interference with the overall federal policy of Indian self-determination. *Id.* As stated by the Tenth Circuit in this case:

> If we were to permit state interference with the tribal scheme, we would be effectively "deny[ing] Indians the opportunity of developing their own system." *Chino v. Chino*, 90 N. M. 204, 561 P. 2d 476, 479 (1977). The federally declared policy of self-determination becomes a mockery if it is subject to defeasance by the State.

Pet. App. at 28a.

The tribal ordinances and regulations are subject to Secretarial approval to insure that the tribal authority is properly exercised under the Indian Reorganization Act, 25 U. S. C. Sec. 476. In *Merrion*, this Court found that such a system of federal check points established an administrative process to monitor the exercise of tribal authority. The tribal regulatory scheme is therefore safeguarded by federal review. 450 U. S. at 141.

This Court has indicated that dual regulatory schemes create mutual dislocations. *Washington v. Confederated Tribes*, 447 U. S. 134 (1980); Pet. App. at 20a. Although infringement is established by the very attempt to impose a dual regulatory system on reservation resources, the actual conflicts between the State and Tribe are substantial. A non-Indian hunter wishing to hunt elk or antelope on the Reservation for two consecutive years would be unable to do so if a state license were required. The Tribe allows hunting of does in order to prevent overpopulation on the Reservation, while the State does not. Furthermore, seasons seldom coincide, and limits on fish taken are also inconsistent. If tribal and state seasons did not overlap at all, the tribal season would be eliminated if state law were held to apply. Such a situation is very possible given the short season for some big game, such as antelope. The possibilities for conflict are virtually infinite, including licensing policy, bag limits, seasons, use of firearms and the time of day hunting is allowed.

Furthermore, the State cannot perform comprehensive wildlife management services on the Reservation. The State concedes that it has no authority to regulate hunting and fishing by tribal members on the Reservation. Only the Tribe has the inherent authority to comprehensively regulate the activity of all hunters and anglers. Only the Tribe may make the decisions and take the action necessary to maintain acceptable levels of fish and wildlife on the Reservation, such as limiting all hunting or fishing, stocking of streams or lakes on the Reservation, and stocking of game. Only the Tribe can conduct comprehensive research and census of hunting and fishing on the Reservation. And, finally, only the Tribe can make the decisions regarding habitat acquisition and improvement.

C. Tribal Regulation Of Reservation Wildlife Resources Can Be Adequately Enforced By Existing Means.

The State has argued that it must have concurrent jurisdiction over hunting and fishing on the Reservation

in order to ensure adequate enforcement, in light of this Court's holding that Indian tribes have no inherent criminal jurisdiction over non-Indians. *Oliphant v. Suquamish Tribe,* 435 U. S. 191 (1978). Enforcement is not a problem. The Tribe has civil penalties available to it just as does the State. This enforcement is augmented by federal enforcement under 18 U. S. C. Sec. 1165 and by tribal power to exclude non-members from the Reservation.

In addition, comprehensive new federal enforcement provisions are now available, pursuant to the Lacey Act Amendments of 1981, codified at 16 U. S. C. Sec. 3371 *et seq.* This new law, passed in November of 1981, makes it a federal offense, among other things, to "import, export, transport, sell, receive, acquire, or purchase any fish or wildlife or plant taken or possessed in violation of any law, treaty, or regulation of the United States or in violation of any *Indian tribal law.*" 16 U. S. C. Sec. 3772(a)(1) (*emphasis added*). The Act provides for substantial civil and criminal penalties for violation of tribal law and authorizes forfeiture of fish or wildlife as well as vehicles or equipment used in the violation. 16 U. S. C. 3373, 3374. The Act also authorizes the Secretary to enter into agreements with Indian tribes to carry out the purposes of the Act, whereby tribal agencies and tribal personnel can make arrests, serve process, and otherwise enforce the provisions of the law. 16 U. S. C. Sec. 3375(a), (b). While 16 U. S. C. Sec. 3378(c) (3) provides that the Act of its own force is not intended to enlarge or diminish the authority "of any State or Indian tribe to regulate the activities of persons within Indian reservations or to alter existing tribal or state jurisdiction over resources within Indian reservations," nevertheless, it does set to rest any arguable concerns about the adequacy of enforcement of tribal fish and game laws on Indian reservations.

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CONCLUSION

For all the reasons set forth above, the Respondent respectfully submits that the decision of the Court of Appeals should be affirmed.

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APPENDIX

THE WHITE HOUSE

OFFICE OF THE PRESS SECRETARY

For Immediate Release January 24, 1983

STATEMENT BY THE PRESIDENT

INDIAN POLICY

This Administration believes that responsibilities and resources should be restored to the governments which are closest to the people served. This philosophy applies not only to state and local governments, but also to federally recognized American Indian tribes.

When European colonial powers began to explore and colonize this land, they entered into treaties with sovereign Indian nations. Our new nation continued to make treaties and to deal with Indian tribes on a government-to-government basis. Throughout our history, despite periods of conflict and shifting national policies in Indian affairs, the government-to-government relationship between the United States and Indian tribes has endured. The Constitution, treaties, laws, and court decisions have consistently recognized a unique political relationship between Indian tribes and the United States which this Administration pledges to uphold.

In 1970, President Nixon announced a national policy of self-determination for Indian tribes. At the heart of the new policy was a commitment by the federal government to foster and encourage tribal self-government. That commitment was signed into law in 1975 as the Indian Self-Determination and Education Assistance Act.

The principle of self-government set forth in this Act was a good starting point. However, since 1975, there has been more rhetoric than action. Instead of fostering and encouraging self-government, federal policies have by and

large inhibited the political and economic development of the tribes. Excessive regulation and self-perpetuating bureaucracy have stifled local decisionmaking, thwarted Indian control of Indian resources, and promoted dependency rather than self-sufficiency.

This Administration intends to reverse this trend by removing the obstacles to self-government and by creating a more favorable environment for the development of healthy reservation economies. Tribal governments, the federal government, and the private sector will all have a role. This Administration will take a flexible approach which recognizes the diversity among tribes and the right of each tribe to set its own priorities and goals. Change will not happen overnight. Development will be charted by the tribes, not the federal government.

This Administration honors the commitment this nation made in 1970 and 1975 to strengthen tribal governments and lessen federal control over tribal governmental affairs. This Administration is determined to turn these goals into reality. Our policy is to reaffirm dealing with Indian tribes on a government-to-government basis and to pursue the policy of self-government for Indian tribes without threatening termination.

In support of our policy, we shall continue to fulfill the federal trust responsibility for the physical and financial resources we hold in trust for the tribes and their members. The fulfillment of this unique responsibility will be accomplished in accordance with the highest standards.

Tribal Self-Government

Tribal governments, like state and local governments, are more aware of the needs and desires of their citizens than is the federal government and should, therefore, have the primary responsibility for meeting those needs. The only effective way for Indian reservations to develop is

through tribal governments which are responsive and accountable to their members.

Early in this nation's dealings with Indian tribes, federal employees began to perform Indian tribal government functions. Despite the Indian Self-Determination Act, major tribal government functions—enforcing tribal laws, developing and managing tribal resources, providing health and social services, educating children—are frequently still carried on by federal employees. The federal government must move away from this surrogate role which undermines the concept of self-government.

It is important to the concept of self-government that tribes reduce their dependence on federal funds by providing a greater percentage of the cost of their self-government. Some tribes are already moving in this direction. This Administration pledges to assist tribes in strengthening their governments by removing the federal impediments to tribal self-government and tribal resource development. Necessary federal funds will continue to be available. This Administration affirms the right of tribes to determine the best way to meet the needs of their members and to establish and run programs which best meet those needs.

For those small tribes which have the greatest need to develop core governmental capacities, this Administration has developed, through the Assistant Secretary of the Interior for Indian Affairs, the Small Tribes Initiative. This program will provide financial support necessary to allow these tribes to develop basic tribal administrative and management capabilities.

In keeping with the government-to-government relationship, Indian tribes are defined by law as eligible entities and receive direct funding, if they wish, in five block grant programs administered by the Department of Health and Human Services. These and other blocks to the states

consolidated dozens of categorical federal domestic assistance programs to reduce fragmentation and overlap, eliminate excessive federal regulation, and provide for more local control. This Administration now proposes that Indian tribes be eligible for direct funding in the Title XX social services block, the block with the largest appropriation and the greatest flexibility in service delivery.

In addition, we are moving the White House liaison for federally-recognized tribes from the Office of Public Liaison to the Office of Intergovernmental Affairs, which maintains liaison with state and local governments. In the past several administrations, tribes have been placed along with vital interest groups, such as veterans, businessmen and religious leaders. In moving the tribal government contact within the White House Intergovernmental Affairs staff, this Administration is underscoring its commitment to recognizing tribal governments on a government-to-government basis.

Further, we are recommending that the Congress expand the authorized membership of the Advisory Commission on Intergovernmental Relations (42 U. S. C. 4273) to include a representative of Indian tribal governments. In the interim before Congressional action, we are requesting that the Assistant Secretary for Indian Affairs join the Commission as an observer. We also supported and signed into law the Indian Tribal Governmental Tax Status Act which provides tribal governments with essentially the same treatment under federal tax laws as applies to other governments with regard to revenue raising and saving mechanisms.

In addition, this Administration calls upon Congress to replace House Concurrent Resolution 108 of the 83rd Congress, the resolution which established the now discredited policy of terminating the federal-tribal relationship. Congress has implicitly rejected the termination policy by enacting the Indian Self-Determination and Edu-

cation Assistance Act of 1975. However, because the termination policy declared in H. Con. Res. 108 has not been expressly and formally repudiated by a concurrent resolution of Congress, it continues to create among the Indian people an apprehension that the United States may not in the future honor the unique relationship between the Indian people and the federal government. A lingering threat of termination has no place in this Administration's policy of self-government for Indian tribes, and I ask Congress to again express its support of self-government.

These actions are but the first steps in restoring control to tribal governments. Much more needs to be done. Without sound reservation economies, the concept of self-government has little meaning. In the past, despite good intentions, the federal government has been one of the major obstacles to economic progress. This Administration intends to remove the impediments to economic development and to encourage cooperative efforts among the tribes, the federal government and the private sector in developing reservation economies.

Development of Reservation Economies

The economies of American Indian reservations are extremely depressed with unemployment rates among the highest in the country. Indian leaders have told this Administration that the development of reservation economies is their number one priority. Growing economies provide jobs, promote self-sufficiency, and provide revenue for essential services. Past attempts to stimulate growth have been fragmented and largely ineffective. As a result, involvement of private industry has been limited, with only infrequent success. Developing reservation economies offers a special challenge: devising investment procedures consistent with the trust status; removing legal barriers which restrict the type of contracts tribes can enter into and reducing the numerous and complex regulations which hinder economic growth.

Tribes have had limited opportunities to invest in their own economies because often there has been no established resource base for community investment and development. Many reservations lack a developed physical infrastructure including utilities, transportation and other public services. They also often lack the regulatory, adjudicatory and enforcement mechanisms necessary to interact with the private sector for reservation economic development. Development on the reservation offers potential for tribes and individual entrepreneurs in manufacturing, agribusiness and modern technology, as well as fishing, livestock, arts and crafts and other traditional livelihoods.

Natural resources such as timber, fishing and energy provide an avenue of development for many tribes. Tribal governments have the responsibility to determine the extent and the methods of developing the tribe's natural resources. The federal government's responsibility should not be used to hinder tribes from taking advantage of economic development opportunities.

With regard to energy resources, both the Indian tribes and the nation stand to gain from the prudent development and management of the vast coal, oil, gas, uranium and other resources found on Indian lands. As already demonstrated by a number of tribes, these resources can become the foundation for economic development on many reservations while lessening our nation's dependence on imported oil. The federal role is to encourage the production of energy resources in ways consistent with Indian values and priorities. To that end, we have strongly supported the use of creative agreements such as joint ventures and other non-lease agreements for the development of Indian mineral resources.

It is the free market which will supply the bulk of the capital investments required to develop tribal energy and other resources. A fundamental prerequisite to economic development is capital formation. The establishment of a

financial structure that is a part of the Indian reservation community is essential to the development of Indian capital formation.

Federal support will be made available to tribes to assist them in developing the necessary management capability and in attracting private capital. As a first step in that direction, we provided funds in the FY 1983 budget to provide seed money to tribes to attract private funding for economic development ventures on reservations. As more tribes develop their capital resource base and increase their managerial expertise, they will have an opportunity to realize the maximum return on their investments and will be able to share an increasing portion of the business risk.

It is the policy of this Administration to encourage private involvement, both Indian and non-Indian, in tribal economic development. In some cases, tribes and the private sector have already taken innovative approaches which have overcome the legislative and regulatory impediments to economic progress.

Since tribal governments have the primary responsibility for meeting the basic needs of Indian communities, they must be allowed the chance to succeed. This Administration, therefore, is establishing a Presidential Advisory Commission on Indian Reservation Economies. The Commission, composed of tribal and private sector leaders, is to identify obstacles to economic growth in the public and private sector at all levels; examine and recommend changes in federal law, regulations and procedures to remove such obstacles; identify actions state, local and tribal governments could take to rectify identified problems; and recommend ways for the private sector, both Indian and non-Indian, to participate in the development and growth of reservation economies. It is also to be charged with

the responsibility for advising the President on recommended actions required to create a positive environment for the development and growth of reservation economies.

Numerous federal agencies can offer specialized assistance and expertise to the tribes not only in economic development, but also in housing, health, education, job training, and other areas which are an integral part of reservation economies. It is to the advantage of the tribes, and in the interest of the taxpayers, that the federal role be fully reviewed and coordinated. Therefore, this Administration directs the Cabinet Council on Human Resources to act as a mechanism to ensure that federal activities are non-duplicative, cost effective, and consistent with the goal of encouraging self-government with a minimum of federal interference.

Summary

This Administration intends to restore tribal governments to their rightful place among the governments of this nation and to enable tribal governments, along with state and local governments, to resume control over their own affairs.

This Administration has sought suggestions from Indian leaders in forming the policies which we have announced. We intend to continue this dialogue with the tribes as these policies are implemented.

The governmental and economic reforms proposed for the benefit of Indian tribes and their members cannot be achieved in a vacuum.

This nation's economic health—and that of the tribes—depends on adopting this Administration's full Economic Recovery Program. This program calls for eliminating excessive federal spending and taxes, removing burdensome regulations, and establishing a sound monetary pol-

icy. A full economic recovery will unleash the potential strength of the private sector and ensure a vigorous economic climate for development which will benefit not only Indian people, but all other Americans as well.

[Attachment omitted.]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON,
Individually and as Director, New Mexico
Department of Game and Fish,
Petitioners,

v.

MESCALERO APACHE TRIBE,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF OF PETITIONERS

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ARGUMENT

Neither 18 U.S.C. § 1165 Nor The Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., Preempt State Authority to Regulate Non-Indian Hunting And Fishing on The Mescalero Apache Reservation.

The Brief of Respondent raises two matters which were not addressed in the Brief of Petitioners and thus warrant a short reply. The Mescalero Apache Tribe claims that 18 U.S.C. § 1165 and the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., provide federal sanctions for violation of the terms and conditions which may be established by an Indian tribe for hunting and fishing on tribal trust lands, and thus State regulation of non-Indian hunting and fishing on tribal trust lands has been displaced as a consequence.

A. 18 U.S.C. § 1165.

While recognizing that the decision of the Tenth Circuit in this case did not give preemptive effect to 18 U.S.C. § 1165, the Brief of Respondent argues that this provision "is deserving of more weight in the scale than it was accorded" as a preemptive measure. Respondent's Brief at 34-35. The Tribe asserts that 18 U.S.C. § 1165 constitutes Congressional recognition of tribal authority to establish terms and conditions for hunting and fishing on reservation trust land and provides federal criminal penalties for a violation of any such tribal conditions. The Brief of Respondent refers to the legislative history of 18 U.S.C. § 1165, which explains that this statute was intended to fill a void in present law with respect to the protection of Indian property, and draws the extraordinary conclusion that Section 1165 is thus an indication "that Congress assumed that the States had no jurisdiction over hunting and fishing on tribal lands." Respondent's Brief at 35.

The conclusion of the Mescalero Apache Tribe in this regard is simply wishful thinking. 18 U.S.C. § 1165 states only that a federal criminal penalty may be imposed against any person who:

> ... without lawful authority or permission willfully and knowingly goes upon any land that belongs to any Indian or Indian tribe ... for the purpose of hunting, trapping or fishing thereon ....

Clearly and simply, Section 1165 is merely a criminal trespass statute. It is not an attempt by Congress to enter the field of hunting and fishing regulation on Indian reservations, nor is it a "recognition by Congress of tribal authority to set terms and conditions for hunting and fishing on the Reservation" and a means by which those conditions may be enforced by the tribe or by the United States.

The terms of the statute do not allow such a construction. The only act prohibited by the statute is entering an Indian reservation to hunt or fish without tribal permission. While this prohibition may be sufficient, with the federal government's assistance, to enforce a tribal permit requirement, there are

numerous other conservation restrictions of critical importance to game and fish management which the statute could not be used to enforce. These include, for example, bag limits, limits on sex of kill, weapons and ammunition restrictions, prohibitions on negligent use of weapons and of fire, and prohibitions against habitat destruction through off-road vehicle use and similar regulations. The statute simply does not evince a comprehensive scheme of game and fish regulation which leaves no room for state jurisdiction.

The legislative history of Section 1165 confirms the plain meaning of the statute. The Senate Report on Section 1165 states with respect to the law's purpose:

> The problem confronting Indian tribes with sizable reservations is that the United States provides no protection against trespassers comparable to the protection it gives to federal property as exemplified by Title 18, United States Code, Section 1863 [trespass on national forest lands]. Indian property owners should have the same protection as other property owners. For example, a private hunting club may keep nonmembers off its game lands or it may issue a permit for a fee. One who comes on such lands without permission may be prosecuted under state law but a non-Indian trespasser on an Indian reservation enjoys immunity. This is by reason of the fact that Indian tribal law is enforcible against Indians only; not against non-Indians.
>
> State laws are of little aid to the Indians in this matter. While non-Indians are subject to state laws when they go on Indian reservations, many of the states do not have criminal trespass laws and in other states the Indians find it most difficult to comply with the requirements of state laws designed to control trespass. Particularly is this true in cases of the so-called closed or unallotted Indian reservations in States where the state law requires each 25 square acres to be closed or posted.
>
> * * *

> Non-Indians are not subject to the jurisdiction of Indian courts and cannot be tried in Indian courts on trespass charges. Further there are no federal laws which can be invoked against trespassers.
>
> * * *
>
> The Committee has considered this bill and believes that the legislation is meritorious. The legislation will give to the Indian tribes and to individual Indian owners certain rights that now exist as to others, and fills a gap in the present law for the protection of their property.

S. Rept. No. 1686, 86th Cong., 2d. Sess., 2-3 (1960).

It is evident from the legislative history of Section 1165 that the statute is only a criminal trespass provision. Relying on this history, the Ninth Circuit Court of Appeals has held:

> . . . 18 U.S.C. 1165 does not represent an attempt by the federal government to enter the arena of fish and game regulation on Indian reservations; the federal statute cannot be viewed as a prohibiting or conflicting act.

U.S. v. Sanford, 547 F.2d 1085, 1089 (9th Cir. 1976). See also *U.S. v. Finch,* 548 F.2d 822 (9th Cir. 1976). The *Sanford* decision found persuasive the Montana Supreme Court's interpretation of Section 1165:

> We hold that a statute which provides a penalty for trespass to the possessory rights of reservation Indians does not conflict with fish and game regulation by the State of Montana.

Montana ex rel Nepstad v. Danielson, 149 Mont. 438, 427 P.2d 689 (1967). This Court confirmed the *Sanford* decision's interpretation in *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191 (1978), when it characterized Section 1165 as a statute designed to provide Indians with federal protection from intruders. 435 U.S. at 205. Moreover, in *Montana v. United States,* this Court referred, in turn, to its decision in *Oliphant*

and noted that the decision there "would seriously restrict the ability of a tribe to enforce any purported regulation of non-Indian hunters and fishermen." 450 U.S. at 565, n.14.

Finally, even the Solicitor of the Department of the Interior has likewise recognized that a criminal trespass statute relating to Indian country (not specifically Section 1165) could not be made into a mechanism for enforcing particular conservation regulations because its purpose was plainly designed to punish trespass. 58 I.D. 331, 347 (1943).

B. Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq.

The Brief of Respondent also points to the Lacey Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., as a means by which tribal hunting and fishing regulations may be enforced against non-Indians, thus displacing the utility of State regulations.

While the 1981 amendments to the Lacey Act may increase the ability of the federal government to enforce particular tribal hunting and fishing regulations, 16 U.S.C. 3772(a)(1), these amendments do not confer upon an Indian tribe any additional authority over non-Indian hunters and anglers, nor does it displace state hunting and fishing regulations pertaining to non-Indians who hunt or fish on tribal lands.

On the contrary, the 1981 amendments to the Lacey Act specifically provide that the Act shall not be construed as diminishing the authority of any State to regulate the activities of persons within an Indian reservation. 16 U.S.C. § 3378(c)(3). Indeed, as the legislative history plainly states:

> Section 9(c)(3) provides that nothing in this Act shall be construed as enlarging or diminishing the authority of any State or Indian tribe to regulate the activities of persons within the Indian reservations. The Committee recognizes that there is a continuing controversy about the extent of State and tribal jurisdiction over resources within Indian reservations and regarding non-Indians on those reservations. *Compare, Eastern Band of Cherokee Indians* v. *North*

> *Carolina Resources Comm'n*, 588 F. 2d 75 (4th Cir. 1978), petition for cert. dismissed, 446 U.S. 960 (1980), *with U.S.* v. *Montana*, 604 F. 2d 1162 (9th Cir. 1979), and *Confederated Tribes of the Coville Indian Reservation* v. *State of Washington*, 591 F. 2d 89 (9th Cir. 1979). Nothing in this Act is intended to preempt whatever jurisdiction individual States may have over resources within Indian reservations under existing law, nor is it intended to alter or change the existing authority of Indian tribes over resources within their reservations.

S. Rept. No. 97-123, 97th Cong., 1st Sess., 1765 (1981).

Accordingly, contrary to the claims of the Mescalero Apache Tribe, neither 18 U.S.C. § 1165 nor the Lacy Act Amendments of 1981, 16 U.S.C. §§ 3371 et seq., deprive the State of New Mexico of jurisdiction to regulate non-Indian hunting and fishing on the Mescalero Apache Reservation.

CONCLUSION

For all the reasons set forth above and in the Brief of Petitioners previously filed in this proceeding, the decision of the court of appeals should be reversed.

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No. 82-331

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1982

STATE OF NEW MEXICO AND HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALERO APACHE TRIBE,

Respondent.

BRIEF OF THE STATE OF ARIZONA, ARIZONA GAME AND FISH COMMISSION, AND THE STATE OF WASHINGTON DEPARTMENT OF GAME AS AMICI CURIAE

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New Mexico Enabling Act, 36 Stat. 557 (1910) 11

No. 82-331

In The

Supreme Court of the United States

October Term, 1982

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE STATE OF ARIZONA, ARIZONA GAME AND FISH COMMISSION, AND THE STATE OF WASHINGTON DEPARTMENT OF GAME AS AMICI CURIAE

The State of Arizona and the Arizona Game and Fish Commission ("Arizona") respectfully submit this brief as amici curiae.[1]

INTEREST OF AMICI CURIAE

This case raises issues which materially affect Arizona's resource management interests. Arizona's interests parallel those of New Mexico, and of many other western states. At stake is the ability of a state to engage in comprehensive management of a constantly evolving and fluid natural re-

[1] Consent from the parties is not required pursuant to S.Ct.R. 36(4).

source, the fish and game found within a state's border.[2] This case also presents the stark contrast between a tribe's use of wildlife to generate revenue and a state's management of wildlife for the benefit and preservation of its citizens, present and future.

This case will also have an impact on Arizona's pending litigation. *White Mountain Apache Tribe v. State of Arizona*, No. CIV-77-867-PHX-WPC, (D. Ariz. Nov. 9, 1977), is awaiting trial before the United States District Court for the District of Arizona following a remand by the Ninth Circuit Court of Appeals in *White Mountain Apache Tribe v. State of Arizona*, 649 F.2d 1274 (1981).

This brief will address the issues as set forth in New Mexico's petition for writ of certiorari.[3]

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[2] To exemplify the impact this case will have on Arizona is the fact that Indian reservations, seventeen in all, comprise nearly twenty-seven percent of the total land mass of Arizona. In the State of Washington, there are twenty-four Indian reservations, many of which include large "fee" (non-Indian) land ownership. The number of reservations in Washington is increasing with the most recent new reservation proclaimed by the United States Department of the Interior regulation in 1982. Sauk-Suiattle Reservation, 47 F.R. 26243, 27 May 1982. Such an action, the creation of a new reservation, cannot deprive a state of jurisdiction over its citizens and its resources. Other western states are faced with similar problems in regard to substantial numbers of Indian reservations contained within their borders.

[3] This brief will not discuss the issue regarding the treaty. We support, however, New Mexico's position on that issue.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT IS NOT IN HARMONY WITH THIS COURT'S DECISION IN MONTANA v. UNITED STATES, 450 U.S. 544 (1981).

The decision below, *Mescalero Apache Tribe v. State of New Mexico*, 677 F.2d 55 (1982), egregiously expands the import of tribal sovereignty as defined in the Court's decisions.

There is no question that Indian tribes "return inherent sovereignty over their own reservation in matters concerning self government and internal relations". *Montana v. United States, supra,* and *Merrion v. Jicarilla*, 71 L.Ed. 21 (1982). The peculiar constitutional status of tribes and the concomitant federal responsibility in relation to those tribes requires this result when only Indians are involved. While limiting tribal criminal jurisdiction to tribal members only, *Oliphant v. Squamish Indian Tribe*, 435 U.S. 191 (1978); *United States v. Wheeler*, 435 U.S. 313 (1978), this Court has allowed for the exercise of tribal civil regulatory jurisdiction as against non-Indians engaging in activity on a reservation. But, like all other constitutional rights, tribal sovereignty is not absolute. It may be abrogated by Congress. *United States v. Mazurie*, 419 U.S. 544 (1975). It may not be exercised if inconsistent with a tribe's dependent status. *Oliphant, supra.* Finally, it is not an absolute bar to the exercise of state laws on a reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), and *Kahn v. Arizona State Tax Commission*, 411 U.S. 164 (1973).

Thus, although sovereignty forms an important backdrop in resolving the jurisdictional dispute present herein, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), it is not the controlling factor.

The strength of a tribe's ability to control and govern pursuant to the concept of sovereignty is diluted when the activity involves non-Indians. For example, the tribe's governing authority diminishes, as applied to non-Indians, as a

result of the tribe's dependent status. Moreover, when the tribe enters the field of economic competition for a certain market, it does so on equal footing with other governmental entities. If it were otherwise, a tribe could simply sell its particular immunity from state taxation to non-Indians with impunity.

The decision of the Tenth Circuit erroneously holds that tribal sovereignty is the overriding consideration when determining the tribe's ability to control non-Indian activity. Apparently, the Tenth Circuit reads *Montana, supra,* as holding that on land held in trust or owned by the tribe, the tribe has an absolute right to govern all activity, Indian and non-Indian. Nothing in *Montana, supra,* supports such a simplistic view. The mere fact that non-Indian activity takes place on a reservation does not insulate the activity from state regulation. As the District Court in *Mescalero Apache Tribe v. O'Chesky,* 439 F.Supp. 1063 (1977), *aff'd,* 625 F.2d 967 (10th Cir. 1980), *cert. denied,* 450 U.S. 959 (1981), *rehearing denied,* 102 S.Ct. 1296 (1982), so cogently noted:

> The Mescalero Reservation is not located by itself on another planet. It is situated in New Mexico. . . .

439 F.Supp. at 1072-73.

The decision below also misconstrues fish and game as resources identical with oil and gas. The Court's reliance on *Merrion, supra,* is inappropriate. In *Merrion,* the question was whether a tribal tax on non-Indian oil and gas leases was permitted by tribal sovereignty or as an aspect of the tribe's power to exclude people from the reservation. Neither raised nor decided was the power of the state to tax the same activity.

The Court focused on the right of a tribe to manage *its resources* for economic return. Clearly, fish and game are not the same as oil and gas.

In addition to misconstruing *Merrion, supra*, the Tenth Circuit decision does not apply the particularized inquiry called for in *Bracker, supra*. When that inquiry is made, we contend that a sufficient state interest exists to justify both the state fishing license requirement and the imposition of state regulations on the non-Indian conduct.

II. THE MESCALERO FISHING PROGRAM.

A. The Tribal Interest.

In the instant case, the United States Fish and Wildlife Service, pursuant to a cooperative agreement with the tribe, provides fish for stocking of the reservation waters. (Mescalero Apache Brief in Opposition, Appendix, page 12A). These fish are then taken from tribal waters by non-Indian fishermen.

The Mescalero fishing program is designed to generate income for the tribe. In this case, the fish are analogous to cigarettes. In *State of Washington v. Confederated Tribes of the Coville Reservation*, 447 U.S. 134 (1980), ("*Coville cigarette case*"), this Court noted:

> All three tribes use federally restricted tribal funds to purchase cigarettes from out of state dealers. The tribes distribute the cigarettes to the tobacco outlets and collect from the operators of these outlets both the wholesale distribution price and a tax of forty to fifty cents per carton.

447 U.S. at 144.

In this case, the tribe is more fortuitous. It does not have to purchase fish from out of state dealers. The tribe obtains fish, without cost, from the federal government. The tribe distributes the fish to various lakes on the reservation. Although in error, apparently the tribe and the Tenth Circuit, view the fish as the property of the tribe until the sale, which is the time they are caught by the non-Indian fishermen.

There are lakes outside the boundaries of the Mescalero Reservation in which the same type of fish may be caught. Thus, what the tribe offers to non-Indian fishermen and what is unavailable elsewhere in the State of New Mexico is an exemption from having to pay a state fishing license fee, in essence selling its Indian immunity from state taxation to non-Indians.

In the Coville cigarette case, this Court condemned tribal attempts to sell this form of Indian immunity:

> What the smokeshops offer these customers, and what is not available elsewhere, is solely an exemption from state taxation. The Tribes assert the power to create such exemptions by imposing their own taxes or otherwise earning revenues by participating in the reservation enterprises. If this assertion were accepted, the Tribes could impose a nominal tax and open chains of discount stores at reservation borders, selling goods of all descriptions at deep discounts and drawing customers [sic] from surrounding areas. We do not believe that principles of federal Indian law, whether stated in terms of pre-emption, tribal self-government, or otherwise, authorize Indian tribes thus to market an exemption from state taxation to persons who would normally do their business elsewhere.

447 U.S. at 155.

Because a tribe is not permitted to open a shopping center, which could be equivalent in size to a lake, with the purpose and effect of luring non-Indians in by the bait of a tax exemption, there is no basis for the tribe to do the same through the guise of a fishing program. This position does no violence to the concept of sovereignty. It merely reflects this Court's holding that a tribe is not entitled to a guaranteed share of a market. *Coville cigarette case, supra.*

B. The Federal Interest.

The federal government provides the fish to the tribe for stocking of lakes as well as performing water quality and habitat management functions. However, the federal gov-

ernment does not regulate the taking of the fish or the licensing fees. Thus, it provides technical assistance, but does not regulate directly or indirectly the non-Indian activity. The federal interest is minimal at best.

State regulation of the taking of fish in no way impedes the federal interest in making a tribe economically self-sufficient. The tribe is free to set its own fishing fees. Nor does state regulation of taking of fish impede the federal policy of providing technical assistance to a tribe.

C. The State Interest.

New Mexico has an interest, as a sovereign state, in regulating non-Indian conduct within its borders. Moreover, it provides the full panoply of governmental services to those people traveling, in the state, to and from the reservation. *Mescalero v. O'Chesky, supra*, 439 F.Supp. at 1073.

New Mexico does not provide the tribe with fish for tribal lakes. The fish come from a federal fish hatchery. This fact is misconstrued as a lack of significant state involvement. In order for New Mexico to demonstrate its interests in this area, it would be necessary for the state to duplicate the efforts of the federal government stocking the same lakes. It is inconceivable that New Mexico would have to engage in a wasteful duplication of money and activity to substantiate an interest in the non-Indian activity. The state's interest, as a sovereign, in regulating non-Indian conduct within its borders should not be diminished for a sound allocation of resources.[4]

III. GAME.

In utilizing the term "game", we refer to elk, antelope, deer, big-horn sheep, wild turkey, bear, and lion. A state's interest in game has unfortunately been defined in the con-

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[4] Washington is a state that plants fish which migrate to and through its reservations. Arizona plants fish in waters adjacent to the reservation.

text of "migration". That term has a technical meaning and generally refers to seasonal movement of game. However, the state's conservation interest is equally implicated by daily movement.

Seasonal movement of game is influenced by a variety of factors including severity of winter, availability of forage, availability of water, population pressures, and/or predators.

For example, elk and deer in the face of heavy winter snows will move from higher elevations to lower elevations. In some instances, that seasonal movement will be from on to off reservation or off to on reservation. However, if snowfall at higher elevations is moderate to light, and therefore the food supply at the higher elevation is adequate, the state does not lose its interest in that game in a year when the seasonal migration is not marked.

To the extent that the state's regulatory interest is contingent upon migration of game, that term must also be construed to include daily movement. Elk, deer, lion, and bear may have substantial daily ranges in terms of their search for food. In both instances, seasonal migration and daily movement, the state's management of that particular game species when off the reservation obviously implicates and affects the viability of that species when it is found on

the reservation.[5] A more difficult question arises when a state has introduced a game species onto a reservation in an area where it does not move on or off the reservation. Even if introduction of the species took place thirty years ago, the state retains an interest in that game. Game exists within an eco system. Eco systems do not respect cartographer's lines on maps or arbitrarily defined political jurisdictional lines. Animals do not move towards a fence boundary which divides a piece of land that is the same on both sides and contemplate whether they are tribal or state game. In this case, the record reflects sufficient game movement to establish New Mexico's interest in regulating non-Indian hunting.

IV. THE TENTH CIRCUIT ERRED WHEN IT CONCLUDED THAT STATE REGULATION OF NON-INDIAN HUNTING AND FISHING ON THE MESCALERO RESERVATION HAD BEEN PREEMPTED BY FEDERAL STATUTORY ENACTMENTS.

The decision on remand focused on the New Mexico Enabling Act, 36 Stat. 557 (1910), the Indian Reorganization Act of 1934, 18 U.S.C. §461, *et seq.*, P.L. 280, 28 U.S.C. §1162 (B), and extensive federal developmental assistance

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[5] We do not necessarily believe that migration and/or daily movement constitute a very sound basis for determing the state's regulatory interest. However, it is the standard imposed on Arizona by its Circuit Court of Appeals in *White Mountain Apache Tribe v. State of Arizona*, 649 F.2d 1274 (9th Cir. 1981). Regardless, no standrad exists for determining the percentage of a game population that must move, daily or seasonally, to justify state regulation. The movement of even small numbers of a species may materially affect long-term population dynamics. More perplexing is the question of jurisdiction when a game population, due to mild weather, does not migrate off reservation in a given year but does move the next year. These problems highlight the defect in a "migration standard". Such a standard ignores the very long-term and ever fluid nature of managing a living resource. In Washington, as in other coastal states, major reservations are located on rivers in which anadromous fish runs migrate to and through its reservations, often supplemented by state plants of fish.

in reaching its preemption conclusion. The essence of the Tenth Circuit opinion was that the Mescalero Tribe had enacted a comprehensive scheme of fishing and hunting regulations and that this program was enhanced by extensive federal assistance. We will consider in order the New Mexico Enabling Act, the statutory basis of the preemption analysis, and the impact of federal developmental assistance.[6]

A. The Framework for Preemption Analysis.

This Court in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), held in part:

> ... [E]ven on reservations, state laws may be applied unless such application would interfere with reservation self government or would impair a right granted or reserved by federal law. [Citations omitted].

411 U.S. at 148. See also United States Department of the Interior, Handbook of Federal Indian Law, §13 (1958).

This general principle was clarified in *Bracker, supra*, in which the Court set forth the analytical framework for determining the question of preemption.

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but is called for a particularized inquiry into the nature of the state, federal and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

448 U.S. at 145.

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[6] The Tenth Circuit decision also relied upon the treaty as a basis for a finding of preemption. As noted previously, this brief will not discuss that issue. We do, however, believe that New Mexico's position on the treaty issue is correct.

In spite of this command, the Tenth Circuit opinion on remand is, in fact, "dependent on mechanical or absolute conceptions of state or tribal sovereignty, . . ." *Bracker, supra.*

B. The New Mexico Enabling Act, 36 Stat. 557 (1910).

The first basis for the Tenth Circuit's finding of preemption is the disclaimer provision of the New Mexico Enabling Act. This provision is identical to Arizona's disclaimer clause. However, these disclaimer provisions relate only to a state's proprietary interest in Indian lands. These provisions do not serve as a predicate for an abandonment of state regulatory jurisdiction over non-Indian conduct on the reservation. *Organized Village of Kake v. Egan,* 369 U.S. 60, 67-69, (1972); *Jicarilla Apache Tribe v. United States,* 601 F.2d 1116 (10th Cir.), *cert. denied,* 444 U.S. 995 (1979); *Coville cirgarette case, supra;* and *White Mountain Apache Tribe v. State of Arizona, supra.*

C. The Indian Reorganization Act of 1934, 25 U.S.C. §461, et seq.

The preemptive effect of this statute, we believe, was clearly set forth by this Court in its decision in the *Coville* cigarette cases.

> Congress has manifested no intent whatsoever to delegate to tribes the far-reaching authority to preempt state fees and regulations otherwise applicable to non-Indians, nor would the opposite be inferred even from federal approval of the Indian taxing ordinances, or from the fact that the tribes exercise congressionally sanctioned powers of self government.

100 S.Ct. at 2082-83. See also *White Mountain Apache Tribe v. State of Arizona, supra.*

D. Public Law 83-280, 67 State. 588 (1953), as Amended, 18 U.S.C. §1162(b).

The purpose of P.L. 280 was to preserve federally granted rights of *Indians* to hunt and fish. *Metlakatla In-*

dian Community v. Egan, 369 U.S. 45, 57 (1962). However, under P.L. 280, states have retained their regulatory jurisdiction over non-Indians hunting and fishing on a reservation. *Fort Mohave Tribe v. County of San Bernadino*, 543 F.2d 1253, 1257 (9th Cir. 1976), and *White Mountain Apache Tribe v. State of Arizona, supra.*

E. General Federal Assistance.

While this Court has recognized a federal goal of promoting tribal self-sufficiency in economic development in *Bracker, supra*, it has also recognized that the tribes are not entitled to a specific guarantee of a share of a certain market *Coville* cigarette cases. However, if federal assistance alone is the controlling factor, almost every aspect of state regulation of non-Indian activity on a reservation would be preempted. Given the trustee relationship between the federal government and the tribe and the numerous federal economic assistance programs to the tribes, every aspect of non-Indian contact with an Indian reservation or tribe is encompassed within the context of these programs. We do not believe that federal assistance alone is the determinative factor. Clearly, this Court recognized such in its opinion in the *Coville* cigarette cases. There, this Court rejected the tribe's argument that the underlying federal policy of promoting economic self-sufficiency served as a basis for preempting Washington's cigarette tax.

The role of federal assistance in determining the preemption question must be viewed, we believe, in the context of the *Bracker* decision. The Court's opinion in *Bracker* cogently sets forth the totally exclusive federal scheme of management and regulation of the timber on Indian reservations. Indeed, not one tree may be cut, felled, sold, bartered, or taken from an Indian reservation without the express approval of the Secretary of the Interior.

Although the goal of the federal govenment in the game and fish area in assisting tribes is to aid them in developing a source of income, it falls woefully short of the comprehensive regulatory scheme that is imposed by the federal govenment on the timber resource. The federal government provides technical assistance in the area of game and fish management, and provides fish for stocking of reservation waters. That is the sum and substance of the federal participation in the game and fish program of an Indian reservation. There is no similar federal control over the number of fish that may be taken, the number of game that may be taken, or the seasons in which either may be taken. There is no federal control over the fees that may be charged by a tribe. We conclude that it is not federal assistance which is the weather vane for a finding of preemption. Rather, it is the degree to which the federal government has regulated the activity itself, the time in which it will take place, the manner in which it will take place, and the costs of the activity. When the *Bracker* standard is thus applied, it is clear that there has been no comprehensive federal regulatory scheme imposed upon the taking of fish or game on an Indian reservation.

V. The Tenth Circuit Erred in Concluding that New Mexico's Regulation of Non-Indian Hunting and Fishing Infringed Upon Tribal Self Government.

The facts in this case amply demonstrate that the Mescalero Apache Tribe has been able to enact is own regulations regarding non-Indian hunting and fishing. The state regulatory scheme has not impeded or interfered with the tribe's ability to function as a government making decisions about non-Indian hunting and fishing. What New Mexico and other states seek to do in a case of this nature was characterized by the Ninth Circuit in *Confederated Tribes of the Coville Indian Reservation v. Washington*, 591 F.2d 89 (9th Cir. 1979), when the Court stated:

> The only authority claimed by the state is to impose upon non-Indians who wish to fish upon the reservation its licensing requirements and such of its statutes and regulations as imposed restrictions equal to or more restrictive than those that the tribes apply to both Indians and non-Indians who fish on the reservation. The state does not claim that it can authorize fishing or fishing practices by non-Indians on the reservation that are prohibited by the tribes' regulations.

591 F.2d at 92.[7]

The effect of conflicting regulations only limits the tribe's ability to raise money "if non-Indians will not risk the violation of state law". *White Mountain Apache Tribe v. State of Arizona, supra* at 1283. Indeed, this reduction of money flowing into tribal coffers, " . . . as in the dual taxation system makes the tribal interest not overly weighty". *White Mountain Apache Tribe v. State of Arizona,* 649 F.2d at 1283.

The facts in this case underscore the weakness of the tribe's claim of economic injury. The increase in the number of people fishing on the reservation and the increase in tribal revenues clearly demonstrate the absence of any economic injury to the tribe.

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[7] It is noteworthy that the Coville Reservation is the only one of Washington's twenty-four in which there has been a challenge to Washington's jurisdiction over non-Indian fishing and hunting. The action was settled and dismissed by a state-tribal agreement that the tribe would not interfere with Washington's exercise of such jurisdiction. The agreement, however, is not the basis for Washington's jurisdictional authority.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the decision of the Tenth Circuit on remand should be reversed by this Court.

Respectfully submitted,

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I, Steven J. Silver, Special Assistant Attorney General for the State of Arizona, do hereby certify that three copies of the foregoing Brief of Amici Curiae of the State of Arizona, Arizona Game and Fish Commission, and the State of Washington Department of Game were served upon each of the following by mailing the same, postage prepaid, this 13th day of January, 1983, all in accordance with the Rules of this Court:

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No. 82-331

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF NEW MEXICO AND HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALARO APACHE TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF OF AMICUS CURIAE SOUTHERN UTE INDIAN TRIBE IN SUPPORT OF RESPONDENT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO AND HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALARO APACHE TRIBE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS

This Brief is submitted with the written consent of the parties to this case, lodged with the Clerk.

Amicus Southern Ute Indian Tribe has enacted regulations for the control and management of wildlife located on

the Southern Ute Indian Reservation, including licensing provisions applied to non-Indians who wish to hunt or fish on reservation land. The Southern Ute Indian Tribe claims the right to regulate such activities to the exclusion of any such regulation by the state of Colorado. The Southern Ute Indian Tribe therefore supports the position of the Mescalaro Apache Tribe herein.

SUMMARY OF ARGUMENT

The interest asserted by the state of New Mexico in the enforcement of its fish and game licensing laws against non-Indians hunting or fishing on the Mescalaro Apache Reservation is too attenuated to justify the associated disruption of tribal wildlife management programs. The traditional tribal interest in hunting and fishing rights is well recognized, and significant tribal interest in the regulation

of hunting and fishing activities of non-Indians on the Mescalaro Apache Reservation is supported by correlated tribal interests in unimpeded self-government and tribal self-sufficiency which surmount any alleged interest of the state in wildlife management within Indian country. The Mescalaro Apache Tribe's right of self-government reasonably includes the right to stimulate economic development through management of those resources which are historically inseparable from the traditional Indian way of life. Analysis of state and tribal interests in light of the preemption and self-government tests firmly supports the finding of the Tenth Circuit: The state of New Mexico may not enforce its fish and game licensing provisions against non-Indians fishing or hunting on the Mescalaro Apache Reservation.

ARGUMENT

I. ENFORCEMENT OF THE FISH AND GAME REGULATIONS OF THE STATE OF NEW MEXICO AGAINST NON-INDIANS HUNTING OR FISHING WITHIN THE EXTERIOR BOUNDARIES OF THE MESCALARO APACHE INDIAN RESERVATION IS ADVERSE TO TRIBAL INTERESTS.

The Mescalaro Apache Tribe has developed a comprehensive wildlife management program. The Tribe employs seven full time tribal conservation officers who work with the Bureau of Indian Affairs conservationist to recommend bag limits and seasons to the tribal council. The tribal conservation officers implement extensive fish and game management programs. With the assistance and advice of the federal government, the Tribe is responsible for stocking the reservation waters with fish; and, in fact, man-made lakes have been built and stocked by the Tribe. See Respondent's Appendix at 7a-8a. Further, the Tribe's achievements with the elk herd located on the reservation are

impressive. At one time that elk herd numbered about thirteen. One hundred sixty-two elk were provided by the National Park Service and released on the reservation, and through the management of the Mescalaro Apache Tribe, including programs designed to reduce the wild horse population which competes with the elk for forage, the elk herd located on the reservation has increased to a population of approximately 1200. Id. at 8a-9a.

The effort of the Mescalaro Apache Tribe has been directed toward maximizing tribal resources. The Tribe has an active tourism program designed to attract non-Indians to the reservation, thereby providing income to be used for governmental purposes and the economic development of the Mescalaro Apache Tribe. The Tribe's tourism program was developed in anticipation of declining

income from lumbering enterprises. Id. at 5a-6a. In connection with this tourism program, the Tribe sponsors hunting, fishing, camping, and picnicking programs. Package hunts of big game animals are also available, and are intended to stimulate business at the Inn of the Mountain Gods, a tribal enterprise located on the Reservation and largely financed by the federal government. Id. at 4a-5a. The Tribe requires non-Indian sportsmen wishing to hunt or fish on the reservation to purchase tribal licenses. Id. at 7a.

The Tribal Council, in making planning decisions, considers, and is entitled to consider, the interplay between hunting and fishing and tourism. One purpose of the package hunts is to promote business at the Inn of the Mountain Gods between the summer tourism season and the winter ski season. Id. at 6a. The

income from lumbering enterprises. Id. at 5a-6a. In connection with this tourism program, the Tribe sponsors hunting, fishing, camping, and picnicking programs. Package hunts of big game animals are also available, and are intended to stimulate business at the Inn of the Mountain Gods, a tribal enterprise located on the Reservation and largely financed by the federal government. Id. at 4a-5a. The Tribe requires non-Indian sportsmen wishing to hunt or fish on the reservation to purchase tribal licenses. Id. at 7a.

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Tribe legitimately considers the economic interrelationship of tourism and outdoor sporting activities when setting seasons for fishing and hunting, and thereby properly acts both to meet the economic needs of the Tribe and to manage effectively wildlife inhabiting the reservation. Similarly, the Tribal Council has properly exercised its judgment in passing tribal regulations which allow a hunter to purchase elk or antelope licenses in two consecutive years. The state does not allow such licensing. Id. at 15a. The Council carefully considers wildlife management goals and economic needs of the Tribe with which the state need not concern itself.

The Mescalaro Apache Tribe has a distinct and recognized interest in governing the territory with which it has been entrusted.

> The Court has repeatedly emphasized that there is a significant geographical component to tribal sovereignty, a component which remains highly relevant to the preemption inquiry; though the reservation boundary is not absolute, it remains an important factor to weigh in determining whether state authority has exceeded the permissible limits.

White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 151 (1980). This "significant territorial component to tribal power" was again recognized by this Court in Merrion v. Jicarilla Apache Tribe, __U.S.__, 71 L.Ed.2d 21, 32 (1982). Further, a noted authority in the field of Indian law has stated:

> Perhaps the most basic principle of all Indian law, supported by a host of decisions, is that those powers which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by express acts of Congress, but rather "inherent powers of a limited sovereignty which has never been extinguished."

F. Cohen, Handbook of Federal Indian Law, p.231, (1982 Ed.) (footnotes omitted).

The importance of fish and game to Indians inhabiting reservations has been established by this Court. See Menominee Tribe v. U.S., 391 U.S. 404 (1968); United States v. Winans, 198 U.S. 371 (1905). The traditional tribal interest in hunting and fishing rights is well recognized, and a significant tribal interest in the regulation of non-Indian hunting and fishing on reservation lands is supported by correlated interests in unimpeded self-government and tribal self-sufficiency. The Mescalaro Apache Tribe has reasonably acted to stimulate economic development through management of an historically protected tribal resource.

This Court stated in White Mountain Apache Tribe v. Bracker:

> The tradition of Indian sovereignty over the reservation and tribal members must inform the determination whether the exercise of state authority has been pre-empted by operation of federal law. As we have repeatedly recognized, this

> tradition is reflected and encouraged in a number of congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development. Ambiguities in federal law have been construed generously in order to comport with these traditional notions of sovereignty and with the federal policy of encouraging tribal independence.

448 U.S. at 143-144, (citations omitted). Specific examples of this congressional policy were pointed out:

> For example, the Indian Financing Act of 1974 states: "It is hereby declared to be the policy of Congress . . . to help develop and utilize Indian resources, both physical and human, to a point where the Indians will fully exercise responsibility for the utilization and management of their own resources and where they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities.

Id. n. 10 (citations omitted). Similar policies underlie the Indian Self-Determination and Assistance Act of 1975 as well as the Indian Reorganization Act of 1934. Id. The tribal interest in an undisturbed administration of wildlife

management programs and the exclusive enforcement of tribal fish and game regulations on the Mescalaro Apache Reservation was properly recognized by the Tenth Circuit as paramount to the interests asserted by the state of New Mexico in the instant case.

II. EXCLUSIVE TRIBAL REGULATION OF FISH AND GAME WITHIN THE EXTERIOR BOUNDARIES OF THE MESCALARO APACHE RESERVATION HAS NO ADVERSE IMPACT ON ANY INTEREST LEGITIMATELY ASSERTED BY THE STATE OF NEW MEXICO.

The state is concerned with facilitating enforcement of state wildlife regulations. This interest is not disturbed by independent tribal regulation, however. New Mexico Department of Game and Fish officers routinely stop hunters to determine whether the game in their possession was legally taken. Respondent's Appendix at 17a. Game tags are issued with each tribal license and must be attached to game taken on the

Mescalaro Apache Reservation. Id. at 7a. In the event that an individual is stopped and game in his possession carries a Mescalaro Apache Reservation tag, no further action need be taken. This presents no greater enforcement problem to state officials than does an out-of-state hunter transporting game taken and tagged out-of-state through the state of New Mexico.

The state alleges, however, that an enforcement gap exists because the Tribe cannot exert criminal jurisdiction over non-Indians committing criminal offenses on the Mescalaro Apache Reservation. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). It first must be pointed out that any difficulty the Tribe might experience in enforcement of tribal fish and game regulations is not a problem with which the state need concern itself, so long as there is no

adverse impact on wildlife outside the reservation, see Respondent's Appendix at 20a. Further, it is clear that the Tribe has the power to exclude non-Indians from the reservation, Merrion, 71 L.Ed.2d at 32; Eastern Band of Cherokee Indians v. N.C. Wildlife, 588 F.2d 75 (4th Cir. 1978); White Earth Band of Chippewa Indians v. Alexander, 518 F.Supp. 527, 534 (D.Minn. 1981); People v. Quechan Tribe of Indians, 424 F.Supp. 969, 972 (S.D. Calif. 1977) vac. on other grounds 595 F.2d 1153; and in addition, 18 U.S.C. §1165 provides for federal prosecution of non-Indians who enter Indian land with the intent to hunt or fish illegally. Finally, the Oliphant decision does not preclude the Tribe from assessing civil penalties against violators as a condition attached to the issuance of tribal permits. See Oliphant, 435 U.S. at 196, n. 7. The

alleged enforcement gap is illusory.

The state asserts an interest in federal funds allocated to the state of New Mexico based on the number of state hunting and fishing licenses sold[1] and the number of acres of land in the state. The Mescalaro Apache Reservation is taken into account for purposes of determining acreage. Respondent's Appendix at 10a. No such funds have been spent directly on the Mescalaro Apache Reservation within recent years, however, id.; and in any case a state interest in the continued availability of federal funds, where those funds are claimed based on an illegal assertion of jurisdiction, fails to legitimate that assertion of jurisdiction.

Petitioners direct the Court's

[1] In recent years state licenses have been required on the Mescalaro Apache Reservation under the protest of the Mescalaro Apache Tribe. See Respondent's Appendix at 10a.

attention to the interest of the state in wildlife conservation. Brief of Petitioners at 21. The state has stipulated, however, that "the Department (of Game and Fish) considers that the hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the reservation at levels consistent with good management and have not had an adverse impact on wildlife outside the reservation." Respondent's Appendix at 20a.

Similarly, the state's asserted interest in a general right to manage and control wildlife is misplaced. The Petitioners cite Baldwin v. Montana Fish and Game Commission, 436 U.S. 371 (1978), for the proposition that the state is entitled to control fish and game within its boundaries. However, Baldwin is a privileges and immunities case standing for the proposition that nonresidents

are not entitled to hunt within the state of Montana for the same license fee as a state resident. The term "state" is used coextensively with the term sovereign, but the word "tribe" could as easily be substituted therefor. The Tenth Circuit properly recognized that such

> language does not describe the ecologically optimum vehicle for regulation of wildlife. Nor does it require that only one sovereign, the State, participate in wildlife management. Instead, it is descriptive of the trusteeship duty imposed on all sovereigns. The Tribe as a sovereign has undertaken that duty, as the State concedes, in an exemplary fashion, vastly improving the wildlife habitat on the reservation.

Mescalaro Apache Tribe v. New Mexico, 630 F.2d 724, 734 (10th Cir. 1980).

Dual regulatory systems create mutual dislocations. This Court has approved state imposition of certain taxes on non-Indians doing business on Indian reservations. Washington v. Confederated

Tribes of the Colville Reservation, 447 U.S. 134, 158, 159 (1980). Incompatible regulatory systems, however, pose different problems than those presented in the non-preemptive tax cases. Id. Further, in certain instances state taxes have been held impermissible under the infringement and preemption analyses. Bracker, 448 U.S. 136; Mescalaro Apache Tribe v. Jones, 411 U.S. 145, 158, 159 (1973); Warren Trading Post Co. v. Arizona Tax Comm'n, 380 U.S. 685 (1965). Under the analysis required by White Mountain Apache Tribe v. Bracker, the assertion of state regulatory jurisdiction before this Court is prohibited.

III. THE JURISDICTIONAL ANALYSIS SET FORTH IN WHITE MOUNTAIN APACHE TRIBE V. BRACKER IS CONTROLLING AND WHEN APPLIED TO THE FACTS OF THE INSTANT CASE CLEARLY PROHIBITS STATE ENFORCEMENT OF STATE FISH AND GAME LAWS ON THE MESCALARO APACHE RESERVATION.

In holding state motor carrier license provisions and use fuel taxes inapplicable to a non-Indian enterprise operating solely on the Fort Apache Reservation, the Court applied two interrelated tests. First, the exercise of state authority may be preempted by federal law. Second, the application of state regulations on the reservation may infringe on the legitimate operation of tribal government. Bracker, 448 U.S. at 142. In Bracker, the Court called for a "particularized inquiry" into the facts of each case in making the preemption and infringement determinations. Id. at 144-145.

It is noteworthy that White Mountain Apache Tribe v. Bracker involved the attempted assertion of state regulatory jurisdiction against non-Indians conducting their activities exclusively within the boundaries of an Indian reservation where

those non-Indian activities were regulated by the Tribe as part of comprehensive resource management programs intended to promote the economic self-sufficiency of the Tribe and raise revenue for application to tribal governmental purposes.

A. TREATY PROVISIONS, FEDERAL LEGISLATION, AND A COMPREHENSIVE TRIBAL REGULATORY SCHEME COUPLED WITH EXTENSIVE FEDERAL INVOLVEMENT PREEMPT THE AUTHORITY OF THE STATE OF NEW MEXICO TO IMPOSE ITS FISH AND GAME LAWS ON NON-INDIANS HUNTING OR FISHING ON THE MESCALARO APACHE RESERVATION.

The Tenth Circuit's preemption analysis appropriately recognized six specific bases for a finding of federal preemption.

> In this case, the treaty and statutory basis for federal preemption is strong. We see as sources of preemption (1) the treaty; (2) the Enabling Act for New Mexico; (3) the Indian Reorganization Act of 1934; (4) the tribal constitution and ordinances enacted pursuant to the IRA; (5) the extensive federal developmental assistance; and (6) the negative inferences from Public Law 280.

Mescalaro Apache Tribe, 630 F.2d at 731. The Court continues "(t)hese factors,

considered in light of the tribe's inherent powers over reservation land and wildlife, compel our conclusion of preemption." Id.

The Tenth Circuit did not place undue emphasis on the "inherent powers" of the Tribe to manage reservation wildlife. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973) requires consideration of tribal sovereignty as a "backdrop" to the preemption analysis. A backdrop issue is not insignificant, as implied by the state; rather it necessarily pervades and colors the foreground. This Court, in White Mountain Apache Tribe v. Bracker stated:

> The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. Even so, traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important "backdrop", against which vague or ambiguous federal enactments must always be measured.

448 U.S. at 143 (citations omitted).

Extensive tribal regulation of hunting and fishing on the Mescalaro Apache Reservation and the comprehensive wildlife management program run by the Mescalaro Apache Tribe, coupled with significant federal developmental assistance, is highly pertinent to a finding of preemption. See Bracker, 448 U.S. 136. The Fourth Circuit in Eastern Band of Cherokee Indians, 588 F.2d 75, found the federal government's developmental assistance "bolsters the Band's economic well being, and is consistent with the United States' trust obligation toward Indian tribes." 588 F.2d at 78. The court concluded "that the strong federal policy supporting the Band's fishing program and the significant federal efforts sustaining it demonstrate an intention to preclude state regulation of non-member fishing on the Band's

reservation." Id. The same conclusion is appropriate in the instant case.

B. APPLICATION OF THE FISH AND GAME LAWS OF THE STATE OF NEW MEXICO TO NON-INDIANS HUNTING OR FISHING ON THE MESCALARO APACHE RESERVATION INFRINGES DRAMATICALLY AND IMPERMISSIBLY ON THE RIGHT OF THE MESCALARO APACHE TRIBE TO REGULATE TRIBAL RESOURCES LOCATED IN INDIAN COUNTRY.

The federal government has established the mechanism by which states may obtain jurisdiction over most crimes and civil causes of action which occur in Indian country. In 1953, Congress enacted Public Law 280 which offered states not specifically enumerated the option of accepting jurisdiction over Indian country. Act of August 15, 1953, 67 Stat. 588, (codified as amended, at 18 U.S.C. §1162, 25 U.S.C. §1321-1326, 28 U.S.C. §1360). New Mexico was not granted any specific authority pursuant to Public Law 280. Petitioner concedes that the state of New Mexico chose not to assume such jurisdiction.

See Brief of Petitioners at 29-30.

In order to resolve any ambiguities in the definition of Indian country, Congress in 1948 enacted 18 U.S.C. §1151. The United States Supreme Court has found that the terms of §1151 not only govern the limits of federal criminal jurisdiction, but also that the statute "generally applies as well to questions of civil jurisdiction". DeCoteau v. District County Court, 420 U.S. 425, 427, n. 2 (1975).

The breadth of the concept of Indian Country is manifested by the congressional determination that Indian country is not restricted to those lands owned by the United States for the benefit of the tribes. The proposition that the federal government's protection of tribal autonomy extends to non-Indian fee lands located within the boundaries of Indian reservations is most dramatically demonstrated in

the case of United States v. Mazurie, 419 U.S. 544 (1975). In Mazurie, even in the context of the limited definition of Indian country for purposes of liquor enforcement, this Court upheld tribal liquor regulations affecting non-Indian fee lands and upheld application of the tribal regulations to the non-Indian defendants as well.

This Court has recognized that, pursuant to their powers of self-government, Indian tribes have the power to regulate wildlife management activities and enforce fishing and hunting regulations in Indian country.

> Indian tribes have the right of self-government over their territory as well as their members. Protecting the resources within that territory involves regulation of nonmember hunting and fishing within reservations. Further, a tribe's authority to regulate nonmembers can be seen as derived from its powers to exclude nonmembers from the reservation and to establish conditions under which nonmembers may enter the reservation, and its authority under federal law

> to grant or deny permission to nonmembers to hunt, fish, or trap on Indian-owned lands. In the exercise of its regulatory authority, a tribe can require a nonmember to purchase a license and to abide by game management rules for the reservation's Indian lands. A tribe is free to set seasons, limits, gear limitations, impose fees and make other regulations, including a total prohibition effective against nonmembers so long as the regulations can be effected without subjecting non-Indians to tribal criminal jurisdiction.

F. Cohen, Handbook of Federal Indian Law, p. 465 (1982 Ed.) (footnotes omitted).

Further, this Court noted in Montana v. U.S., 450 U.S. 544 (1981) that non-Indians fishing or hunting on reservation land owned by non-Indians may be regulated where there is some threat to or direct effect "on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566. Accord, Eastern Band of Cherokee Indians, 588 F.2d at 79; cf. Bracker, 448 U.S. 136 (establishing the same principle within the context of the lumber industry). In

the instant case, just such a threat has been demonstrated.

V. WHITE MOUNTAIN APACHE TRIBE V. BRACKER REQUIRES A "PARTICULARIZED INQUIRY" INTO "THE NATURE OF STATE, FEDERAL, AND TRIBAL INTERESTS AT STAKE," AND SUCH AN INQUIRY FULLY SUPPORTS THE CONCLUSION OF THE TENTH CIRCUIT THAT THE STATE OF NEW MEXICO CANNOT LAWFULLY IMPOSE ITS FISH AND GAME REGULATIONS ON THE MESCALARO APACHE RESERVATION.

The Tenth Circuit made both the preemption and infringement analyses, applying principles explicated in White Mountain Apache Tribe v. Bracker. Mescalaro Apache Tribe, 630 F.2d 724. The Court applied a preemption analysis to pertinent treaties and federal legislation and closely examined the comprehensive tribal regulatory system and extensive federal developmental assistance and ultimately found federal preemption of the field. The court then looked to the tribe's right to self-government and found that the state had not asserted any interest sufficient to overcome the

tribe's interest in self-government.

A. THERE IS NO INCONSISTENCY BETWEEN THE DECISION OF THE TENTH CIRCUIT IN THE INSTANT CASE AND THE DECISION OF THIS COURT IN MONTANA V. UNITED STATES.

Montana held that the Crow tribe did not have the power to regulate non-Indians hunting and fishing on reservation lands owned in fee by nonmembers of the tribe. However, Montana is not applicable to the instant case. The first and most obvious distinction is that Montana dealt with regulation of non-Indian hunters on land owned in fee by non-Indians; however, the character of ownership of land is not solely determinative of the right to regulate in the area of wildlife management. Of greater significance is the level of federal involvement and the extent of tribal regulation.

The court below stated: "(T)he case before us deals with the broad power of

the tribe to control, exploit, and regulate tribal resources on tribal land." Mescalaro Apache Tribe v. New Mexico, 677 F.2d 55, 57 (10th Cir. 1982). The court likened the instant case to Merrion v. Jicarilla Apache Tribe, a finding consistent with the trend recognizing tribal regulatory authority in the area of resource management where the tribe's traditional interest in hunting and fishing rights is linked with a pervasive tribal regulatory scheme aimed at economic development. See Eastern Band of Cherokee Indians, 388 F.2d 75. See also Colville Confederated Tribes v. Walton, 647 F.2d 42, (9th Cir. 1981); Quechan Tribe of Indians, 424 F.Supp. 969.

B. THERE IS NO INCONSISTENCY BETWEEN THE DECISION OF THE TENTH CIRCUIT IN THE INSTANT CASE AND THE DECISIONS OF OTHER COURTS.

Recent decisions confirming state jurisdiction to regulate non-Indian

hunting and fishing in Indian country following application of the Bracker analysis, find insufficient evidence of federal preemption, the absence of tribal regulation coupled with an interest in tribal self-government or economic self-sufficiency, or both. See White Earth Band of Chippewa Indians, 518 F.Supp. 527, Quechan Tribe of Indians, 424 F.Supp. 969. Of course, an overriding state interest in conservation may be found where Indian hunting or fishing practices threaten the continuation of species, Washington Game Department v. Puyallup Tribe, 391 U.S. 392 (1968), but those facts are not presented in the instant case.

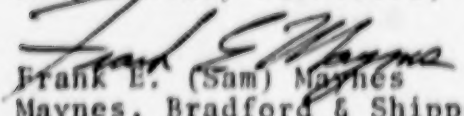
In Eastern Band of Cherokee Indians, the court found that strong federal policies of support for the Band's fishing program demonstrate an intent to preclude state regulation of non-Indians

fishing on the reservation. It was also found in that case that state regulation would impede the goals of tribal self-government and financial self-sufficiency. Id., 388 F.2d 75.

CONCLUSION

Under the analytical framework set forth in White Mountain Apache Tribe v. Bracker, examination of the state, federal and tribal interests at stake establish the right of the Mescalaro Apache Tribe to the exclusive control of wildlife within the boundaries of the Mescalaro Apache Reservation. That analysis defeats any attempt by the state to assert jurisdiction over non-Indians hunting and fishing within the exterior boundaries of the Mescalaro Apache Reservation; therefore, the Tenth Circuit should be affirmed.

Respectfully submitted,



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IN THE

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OCTOBER TERM, 1982

STATE OF NEW MEXICO, *et al.*,
Petitioners

v.

MESCALERO APACHE TRIBE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE UINTAH AND OURAY TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

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BRIEF FOR THE UINTAH AND OURAY TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

CONSENT TO FILING OF BRIEF AMICUS CURIAE

Copies of letters from both parties consenting to the filing of this brief have been filed with the Clerk.

STATEMENT OF INTEREST

Amicus Curiae, the Uintah and Ouray Tribe of the Uintah Valley Reservation in the State of Utah, is an

Indian Tribe organized under the provisions of the Indian Reorganization Act, 25 U.S.C. § 476, and possessing natural resources including hunting and fishing rights which are a vital part of the Tribe's present and planned economic enterprises.

The Uintah and Ouray Tribe supports the position of the Respondent Mescalero Apache Tribe and joins in asserting that the State of New Mexico does not possess jurisdiction to regulate the disposition of any part of the tribe's natural resources.

SUMMARY OF ARGUMENT

Wild game of a wide variety and products derived therefrom since the coming of settlers—especially with trappers and trading posts—have been articles of commerce. Trade with non-Indians involving those articles has been subject to the Indian Commerce Clause of the United States Constitution leaving the states without authority to impose their regulations and thus unduly burden or disrupt Indian commerce. See, *Merrion v. Jicarilla Apache Tribe*, 445 U.S. 130,154-5 (1982). Congress has exercised its power under the Indian Commerce Clause (a) by delineating the geographic area within which the tribe's property interests are protected; (b) by recognizing lawful authority of the tribe to grant authority or permission to non-Indians to take game on Indian trust lands; and (c) by explicitly sanctioning tribal constitutional authority to manage hunting and fishing by non-Indians. Accordingly, the state is pre-empted from regulating this principal item of Indian commerce, initially by the Indian Commerce Clause and subsequently by legislation providing for tribal regulation of its own resources.

ARGUMENT

Natural resources of the reservation are a property right of the tribe recognized by the United States upon establishment of the reservation. *United States v. Winans*, 198 U.S. 371 (1905). The game upon those reservations now and have been since the establishment of this republic articles of commerce of varying volume throughout history depending upon the time, place and market conditions. See F. Prucha, *American Indian Policy in the Formative Years*, 66-101 (1962).

Under authority of the Indian Commerce Clause, article I, § 8, cl. 3., the United States has taken these actions generally with respect to the Indian tribes of this country:

1. The United States has set aside reservations and those reservations have included the wild game thereon. *Alcea Band of Tillamooks v. U.S.*, 329 U.S. 40 (1945).

2. The United States has provided criminal sanctions for non-members of a tribe who go upon trust lands of a reservation to hunt, trap, or fish "without lawful authority or permission." 18 U.S.C. § 1165.

3. The United States has provided a statutory scheme through which procedure for granting that lawful authority or permission has been channelled; 25 U.S.C. 476. *Oglala Sioux Tribe v. Barta*, 146 F. Supp. 917, 918 (U.S. District Ct. So. Dak. (1956)).

These actions by the United States considered together, all taken under the Indian Commerce Clause, constitute a consistent, comprehensive treatment of the tribe's natural resources—resources, the land and the game thereon, which were the only thing of commercial value from the very beginning. Of course, it must be recognized that the status of reservations since their establishment has not

remained unchanged. As this Court ruled in *Montana v. United States*, 450 U.S. 544 (1981) the status of the tribe's right on the reservation was modified to the extent that land within the boundary of a reservation passed into fee simple status. That, however, has virtually no relevance here since less than 200 acres have been passed into fee simple status and there is no allegation that the hunting took place on that tract. The only other authority a state might possess would be when the tribe in effect performed the equivalent of "pursuing the last steelhead into their nets." See, *Puyallup Tribe v. Dept. of Game*, 433 U.S. 165 at 176-77. Those circumstances are absent here.

The item involved here, tribal game, contrasts sharply, in terms of traditional tribal property rights, with other items involved in jurisdictional conflicts with states. See, e.g., *Bryan v. Itasca County*, 426 U.S. 373 (1976) (trailer house); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) (monetary income); and *Central Machinery Company v. Arizona Tax Commission*, 100 S. Ct. 2492 (1980) (farm tractors). In *Central Machinery Company* this Court noted that the Indian trader statutes applied to an unlicensed salesman (conceivably an itinerant peddler under the regulations) and, giving the statutes 'a sweep as broad as [their] language', it was "the existence of Indian trader statutes . . . and not their administration . . . that pre-empts the field of transactions with Indians occurring on the reservation." Id. at 2595-2596. It should be noted that the regulations also contemplate purchase from Indians. 25 C.F.R. § 251.6. It would be difficult for Indians to accept, in view of the recent cases, that such recent acquisitions in their history as trailer houses, money income and farm tractors could be protected from intrusive regulation by states but an article which has been with them since their existence on this continent would be taken over by state governments.

The recognition of tribal right to grant authority or permission to take game on its lands by the Act of July 12, 1960, 74 Stat. 469, resembles in some respects the delegation of authority to permit non-Indians to establish a liquor store on the reservation. See 18 U.S.C. §§ 1151, 1154(a) and 1154(c). In that legislation Congress provided that the permission should be "in conformity both with the laws of the state . . . and an ordinance duly adopted by the tribe . . . The Congress made no provision for conformance with state laws in the legislation here involved. Moreover, the "conforms with state law" language has been viewed not as granting state authority over the activity but as a guideline. II Opinions of the Solicitor 2026, Interior Department.

This area of commercial activity with Indian tribes ought not by judicial fiat be thrown to the states which long have been hostile to the Indian tribes in their midst. If any transfer of this area of commerce is to be made it should be by Act of Congress where the tribes might have a voice in formulating the conditions upon which the states might acquire some control over their natural resources.

CONCLUSION

For the foregoing reasons the judgment of the Tenth Circuit should be sustained.

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No. 82-331

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October Term 1982

STATE OF NEW MEXICO and HAROLD F. OLSON, Individually and as Director, New Mexico Department of Game and Fish,

Petitioners,

v.

MESCALERO APACHE TRIBE,

Respondent.

BRIEF OF AMICUS CURIAE STATE OF UTAH IN SUPPORT OF PETITIONERS

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January 19, 1983

QUESTIONS PRESENTED

1. Whether the Tenth Circuit complied with this Court's instructions to reconsider its original decision in this case in light of *Montana v. United States*, 450 U.S. 544 (1981).

2. Whether the Mescalero Apache Tribe has "inherent authority" over wildlife within the Mescalero Apache Reservation which pre-empts the application of state game and fish laws to non-Indians hunting or fishing within the reservation.

3. Whether the application of state game and fish laws to non-Indians hunting and fishing on the Mescalero Apache Reservation infringes on the right of the Mescalero Apache Tribe to self-government.

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BRIEF OF AMICUS CURIAE STATE OF UTAH IN SUPPORT OF PETITIONERS

INTEREST OF UTAH AS AMICUS CURIAE

This case is of extreme importance to Utah and all States having large tracts of Indian land within their borders. The decision of the Tenth Circuit Court of Appeals below, if affirmed, will result in a virtual confiscation of important wildlife resources. In practical effect, certain species of public wildlife resources migrating on and off Indian reservations would be converted to the status of tribal livestock while they were on reservation lands. The State of New Mexico and the State of Utah

as amicus clearly have an ownership interest in trust and a management responsibility over game species within their borders which are not destroyed or defeased when the animals cross from state lands to reservation lands.

The State of Utah contains within its borders two major Indian reservations — the Uinta-Ouray Reservation and portions of the Navajo Reservation — comprising millions of acres. These reservations contain trust lands and also a great amount of non-trust lands, including federal, state, and private property. Many species of game and fish abound within these reservations, such as deer, elk, antelope, bighorn sheep, pheasants and chukar. Big game animals in particular do not remain year-round on the reservations but migrate freely, usually from summer ranges to winter ranges. For example, the northern portions of the Uinta-Ouray Reservation in northeastern Utah abut the Ashley National Forest on the south slope of the Uinta Mountains. During the spring and summer, the local deer and elk herds migrate from reservation lands up into the national forest for their summer range. During the fall and winter, these animals migrate down to lower elevations to escape the mountain snows, and cross back into the reservation. Such herds are managed as part of the state's overall game management plan—which includes season and harvest criteria—in order to maintain viable game populations within the State.

The State of Utah is also seriously concerned that the decision of the court below leaves a massive juris-

dictional vacuum. Indian tribes do not have the power to punish or try non-Indians for criminal offenses, absent a specific congressional authorization (*Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 [1978]), and no pre-emption, express or implied, has been made by Congress in this area.[1] There are no general federal game laws, and nothing to grant tribal courts jurisdiction over non-Indians who violate tribal game ordinances. Therefore, if the holding of the court below is affirmed and the states are forbidden to apply their game laws to non-Indians on the reservation, it would be impossible to prosecute non-Indians for acts committed on the reservation which violate both state game laws and tribal ordinances.

The lower court's decision, if affirmed, will have the potential of totally disrupting long established game management programs, and could divest the states of their sovereign rights to regulate and control the harvesting of game by non-Indian sportsmen within their borders.

ARGUMENT

I. *Preface*

The State of Utah fully supports and concurs in the points raised and argued by the State of New Mexico in its brief, and simply wishes to present the few additional comments set forth below.

---

[1] The only possible vehicle for enforcement would be 18 U.S.C. §1165 which is a trespass statute and does not directly relate to the illegal taking of fish or game. See **Oliphant v. Suquamish Tribe, supra.**

II. *The Decision of the Tenth Circuit on Remand Ignores This Court's Instruction to Reconsider the Case in Light of Montana v. United States*

Upon granting the State of New Mexico's previous petition for a writ of certiorari, this Court vacated the decision of the Tenth Circuit and remanded the case with the clear instruction that the Tenth Circuit should reconsider its decision "in light of *Montana v. United States*, 450 U.S. 544 (1981)." 450 U.S. 1036 (1981). On remand, however, the Tenth Circuit chose to distinguish this Court's opinion in *Montana*, and simply reinstated its previous decision based on this Court's decision in *Merrion v. Jicarilla Apache Tribe*, ... U.S. ....., 71 L.Ed. 2d 21 (1982).

The Tenth Circuit was in error to lightly brush aside the principles announced by this Court in *Montana*, and base the reinstatement of its previous decision on *Merrion* — which did not even deal with game and fish jurisdictional matters, but dealt instead with the authority of an Indian tribe to levy a mineral severance tax. The *Merrion* case did not even address the issue of whether or not a state could levy a concurrent mineral severance tax.

It is abundantly clear that *Merrion* is irrelevant to the issues to be decided in this case, especially since this Court specifically instructed the Tenth Circuit to review its decision in light of *Montana*. The issues to be resolved in this case were addressed by this Court in *Mon-*

tana, not *Merrion*, and the Tenth Circuit erred in ignoring the instructions of this Court on remand.

III. *State Regulation of Non-Indian Hunters Will Not Impair Tribal Sovereignty*

This Court made it clear in *Montana v. United States, supra*, that Indian tribes retain certain attributes of sovereignty to exercise jurisdiction over non-Indians only where the regulations promulgated have a clear and direct relationship to tribal self-government. However, the enforcement of New Mexico's game laws regulating non-Indian hunters on the Mescalero Apache Reservation—whether hunting on trust or non-trust lands—would not interfere with any attributes of tribal sovereignty or tribal self-government.

The tribal members are, of course, free to hunt and fish on the reservation and in so doing are not subject to state laws. The tribe is also free to formulate game and fish management programs within the reservation. The point to be made is that there is a big difference between tribal members fishing and hunting for their own subsistence, and the commercialization of hunting and fishing such as is presently being promoted on the Mescalero Reservation. The obvious drawing card for reservation hunting—from the Indians' point of view—is that they can offer out-of-state hunters a cheaper and more attractive hunt if those hunters do not have to obtain a non-resident New Mexico license or abide by the State's general game and fish laws.

In this respect, the situation is not unlike that of the Indian "smokeshops" addressed by this Court in *State of Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980). There is no valid reason why non-Indians, hunting on the reservation, should not be required to obtain a valid state hunting license. That requirement certainly does not interfere with any attributes of tribal self-government. The Tribe, in seeking to exempt non-Indian hunters from state law, is simply attempting to attract more hunters and thereby avail itself of the accompanying economic benefits and competitive advantages.

Aside from depriving the States of revenues from the sale of hunting and fishing licenses, the tribal commercialization of these wildlife resources can have a detrimental effect on game herds which migrate back and forth across reservation boundaries. The Tribe, and the lower court in making much ado about the tribe's interest in game on the reservation, appear to see the reservation's deer, elk, bear and antelope populations as tantamount to Indian livestock—comparable to a "natural resource" just like timber or an ore deposit. Indeed, no legitimate interest of the Tribe can be said to be threatened by state jurisdiction over non-Indian hunting unless this rather unorthodox view is accepted.

But forests and mineral deposits do not range freely on and off the reservation as do its deer, elk, bear and antelope populations. This is not a case like the "put-and-take" fishing in *Eastern Band of Cherokee Indians*

v. North Carolina Wildlife Resources Commission, 588 F.2d 75 (4th Cir., 1978), on which the Tribe relies so heavily. Is it the Tribe's assertion that its alleged ownership of these animals goes through a semi-annual cycle of vesting and divesting as the game animals migrate back and forth across the reservation's boundaries? It cannot reasonably be argued that the State has an interest in such game animals only during the times they spend off the reservation.

State regulation of non-Indian sportsmen on Indian reservations cannot be said to impair tribal sovereignty, since such "sovereignty" extends only to the tribe's internal affairs. This case deals with the relationship between New Mexico and non-Indian sportsmen.

CONCLUSION

The holding of the Tenth Circuit Court of Appeals, if affirmed, threatens to tragically disrupt game management—not only in New Mexico but in every State having large tracts of reservation land within its borders.

For the foregoing reasons, coupled with the reasons set forth by Petitioner State of New Mexico, the State of Utah respectfully submits that the decision of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David L. Wilkinson, Attorney General of and counsel for the State of Utah, and a member of the Bar of this Court, do hereby certify that three copies of the foregoing BRIEF OF AMICUS CURIAE STATE OF UTAH IN SUPPORT OF PETITIONERS were served upon each of the following by mailing the same, postage prepaid, this 10th day of January, 1983, all in accordance with the Rules of this Court:

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE WHITE MOUNTAIN APACHE TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

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SUPREME COURT OF THE UNITED STATES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE WHITE MOUNTAIN APACHE TRIBE AS AMICUS CURIAE SUPPORTING RESPONDENT

The White Mountain Apache Tribe of the Fort Apache Indian Reservation respectfully submits this brief as amicus curiae.[1]

INTEREST OF AMICUS CURIAE

The White Mountain Apache Tribe occupies a portion of its aboriginal homeland on approximately 1.6 million acres in the north central and eastern portion of the State of

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[1] Consent of the State of New Mexico and the Mescalero Apache Tribe has been granted to the White Mountain Apache Tribe to file this brief pursuant to S. Ct. R. 36.2.

Arizona on what is now known as the Fort Apache Indian Reservation. Like the Mescalero Apache Tribe, the White Mountain Apache Tribe owns all but a miniscule area (approximately 48 acres) of its heavily forested and mountainous Reservation which like the Mescalero Apache Reservation has a federal fish hatchery which provides fish for stocking on the Reservation's abundant streams and man-made lakes and impoundments. The topography, fauna and flora which thrive on the Fort Apache Indian Reservation are similar to that on the Mescalero Apache Reservation.

The White Mountain Apache Tribe, like the Mescalero Apache Tribe with the financial and technical assistance of the Bureau of Indian Affairs, the United States Bureau of Sports Fisheries, and United States Indian Fisheries Assistance Program, has developed, managed, utilized and maintained a recrea-

tional hunting, fishing and camping program as part of its overall economic development and goals of self-sufficiency and economic independence.

In summary, many factual aspects of the Mescalero Apache Tribe's litigation with the State of New Mexico parallel those involved in the present litigation between the White Mountain Apache Tribe and the State of Arizona. The White Mountain Apache Tribe's case, styled White Mountain Apache Tribe v. State of Arizona, No. CIV-77-867 PHX-WPC (D. Ariz. Nov. 9, 1977), is now awaiting trial before the United States District Court for the District of Arizona, following remand to the court from the Ninth Circuit Court of Appeals in the case styled White Mountain Apache Tribe v. State of Arizona, 649 F.2d 1274 (1981).

Both the State of Arizona in the White Mountain Apache case and the State of New

Mexico in the case at bar, are attempting to license and regulate non-Indian hunting and fishing on the two respective reservations of these tribes. These state attempts conducted under the auspices of state-wide game and fish management for the ostensible benefit of citizens on a state-wide basis cannot possibly achieve that goal without tribal assent or subjugation and are in actuality little more than naked revenue generating devices designed to reap immeasurable revenues and benefits from the results of tribal initiative in recreational development with a concomitant insignificant state contribution.

It is this imminent threat to tribal sovereignty over its natural resources and infringement upon tribal self government that compels the White Mountain Apache Tribe to enter its appearance as amicus curiae on behalf of the Respondent. The interest of

the White Mountain Apache Tribe in resisting state encroachment on its ancestral lands and water is identical to that of the Mescalero Apache Tribe in this case.

This brief adopts without restatement the statement of the case set forth by the Respondent Mescalero Apache Tribe and the brief of the United States as amicus curiae.

The White Mountain Apache Tribe fully supports the legal arguments set forth in the brief of the Respondent and will distinguish where pertinent, misconceptions of the applicable law set forth in the amici curiae brief of the State of Arizona and State of Washington.

ARGUMENT

I. JUDICIAL GUIDELINES FOR DETERMINING THE JURISDICTION OF THE MESCALERO TRIBE OVER HUNTING AND FISHING ON THE MESCALERO APACHE RESERVATION TO THE EXCLUSION OF THE STATE OF NEW MEXICO ARE WELL ESTABLISHED.

A. Preemption Analysis

This Court has provided State and Federal Courts with a comprehensive framework of inquiry to make a determination whether or not federal law, policy, or activity preempts the exercise of state authority over non-Indians involved with Reservation activities. White Mountain Apache Tribe v. Bracker, 448 U.S. 436 (1980); Ramah Navajo School Bd v. Bureau of Revenue of New Mexico, ___U.S.___ (1982), 102 S. Ct. 3394 (1982).

This framework of inquiry to determine the existence or not of federal preemption calls for "a particularized inquiry into the

nature of the state, federal, and tribal interests at stake." White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 144-145.

The fundamental backdrop against which the State of New Mexico's actions must be measured involve traditional notions of tribal sovereignty and self-government. Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. United States v. Wheeler, 435 U.S. 313, 323 (1978). The tradition of Indian sovereignty over its reservation and tribal members long recognized by this Court, informs the determination whether the exercise of state authority has been preempted by operation of federal law. White Mountain Apache Tribe v. Bracker, supra, 448 U.S. at 141-145, 100 S.Ct. at 2582-2584.

It is well understood that by virtue of their dependent nation status Indian tribes do not have the authority to wage war, enter into treaties with foreign nations, or to exercise criminal prosecutorial power over non-Indians. However, in areas where tribes retain the full attributes of sovereignty, such as over their tribal members, territory and natural resources, they may exercise and offer the full panoply of governmental authority and services. The authority manifests itself by tribal courts, the exercise of extensive civil jurisdiction by the implementation of taxation, and plenary control, subject only to the authority of the trustee United States, over the preservation, utilization, management, and development of the natural resources of the reservation. United States v. Mazurie, 419 U.S. 544, 557 42 L.Ed 2d 706, 95 S.Ct. 710 (1975); United States v. Wheeler, supra, 435 U.S. at 323

55 L.Ed.2d 303, 98 S.Ct. 1079 (1978); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55-56- 55 L.Ed 2d 106, 98 S.Ct. 1670 (1978).

These natural resources, include but are not limited to timber, grazing lands, water, minerals and game and fish which are found within the exterior boundaries of the reservation.

Tribal sovereignty necessarily embodies a geographical component- that being the reservation itself and must necessarily extend to and protect the sovereign right and authority of an Indian tribe to market the value derived from the development of reservation resources. This right without interference from the State of New Mexico, to recover and market value derived from reservation resources fulfills the federal purpose behind the creation of the Mescalero Apache Reservation as discussed, infra.

This hegemony over tribal territory

exercised by the Mescalero Apache Tribe exists subject only to the sufferance of Congress and until Congress acts, the tribe retains their existing sovereign powers over their reservation and its natural resources.

The Tribe's traditional sovereign powers over natural resources is discussed, infra, which establishes that it is in this area where tribal and federal interests are so paramount as to "move from a mere backdrop into a leading role in the litigation stage." Mescalero Apache Tribe v. State of New Mexico, 630 F.2d 726, 728 (10th Cir., 1980).

B. Arguments of the State of New Mexico and Amici States of Arizona, Utah, and Washington Do Not Adhere to Judicial Pre-emption Guidelines.

Arguments submitted by the State of New Mexico and amici curiae State of Arizona, Utah and Washington avoid the "particularized inquiry" determinative of federal

preemption and attempt to characterize the Mescalero Apache case as a regulation case and cite State of Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980) as authority for concurrent state regulation of non-Indian hunting and fishing within the Mescalero Apache Reservation.

The Colville case, supra, involved the authority of the State of Washington to collect a sales tax on the sale of cigarettes to non-Indians who purchased the cigarettes from tribally owned smoke shops within the exterior boundaries of the Colville Reservation.

This Court upheld the imposition of the state's tax on such sales to non-Indians noting in holding that the tribe was marketing its sales tax exemption rather than value derived or generated on the reservation "by activities in which the tribes have a significant interest." Id at 155.

The implication from the Court's holding in the cigarette tax case is that the Indian Commerce Clause would invalidate state taxes or regulation where value generated and derived on and from the reservation was at issue. The result in Colville, supra, might have been quite opposite if the tribes there had planted, cultivated, and harvested tobacco and manufactured the cigarettes sold to non-Indians.

In the Mescalero case, the value marketed is at the other extreme as that involved in the cigarette tax case. The Mescalero Apache Tribe is marketing a value solely derived and generated by the natural resources of the reservation. The game and fish which thrive in the favorable habitat on the reservation have been developed, managed, preserved and maintained by tribal initiative and revenues with the cooperation and assistance both monetary and

technical of the federal government. But for the favorable habitat, conservation and game and fish management practices of the Mescalero Tribe and the federal government, there would be no "value" to market to non-Indians.

The Petitioners and amici in support, avoid the crucial court distinction between value derived from reservation resources and that which is not and instead attempt to bring the Mescalero case within the holding of Colville by likening a discount shopping center marketing a tribal sales tax exemption to a reservation lake of the same size. To state the analogy is to refute it. Such an analogy belies the substantial tribal interest in game and fish and the maintenance and preservation of their habitat on the reservation. Such a tribal interest is no different than that discussed in White Mountain Apache Tribe v. Braker, supra,

regarding Indian timber or the oil and gas discussed by this Court in Merrion v. Jicarilla Apache Tribe, ____U.S.____, 716 L.Ed 2d 21 (1982). All of the above constitute value generated on or derived from federal and tribal activity within the exterior boundaries of Indian Reservations in order to achieve and fulfill the federal purpose and policy behind the creation of reservations, tribal economic self-sufficiency and independence.

C. The Federal Interests Involved Are Substantial.

The brief of the United States as amicus curiae and the brief of the Respondent Mescalero Apache Tribe amply discuss the substantial federal interests involved in this case. Amicus White Mountain Apache Tribe further suggests that the penumbra effect and central purpose of various federal statutes discussed, infra, is to protect

Indian Reservations from other than federal authority, to perpetuate their existence as viable tribal homelands and to develop reservations toward economic self-sufficiency and independence through administration of the United State's trust responsibilities and the exercise of tribal self-government.

The Mescalero Apache Tribe like amicus White Mountain Apache Tribe, is organized under Section 16 of the Indian Reorganization Act of 1934 and as such is governed by a Constitution adopted pursuant to the Act, 25 U.S.C. §461, et seq., specifically, 25 U.S.C. §476.

The Indian Reorganization Act of 1934 was enacted in recognition by the federal government of the failure of its assimilation policies and represented a fundamental change in federal policy toward Indian tribes.

The Indian Reorganization Act reaffirmed

the Mescalero Apache Tribe's inherent sovereignty over its territory and people and established a federally recognized government to government relationship with the Mescalero Apache Tribe and the United States of America. It requires no citation or argument that the federal policy behind the Indian Reorganization Act was to encourage the preservation of tribal natural resources, culture, values and language, self-government and self-determination by the establishment of viable tribal governments responsible for carrying out these goals.

The Mescalero Constitution which has been ratified by the Secretary of the Interior reaffirms the tribe's inherent historical sovereignty and power "[t]o protect and preserve the property, wildlife and natural resources of the tribe, and to regulate the conduct of trade and the use and disposition of tribal property upon the reservation."

Article XI, §1 (c) Mescalero Apache Constitution.

Additionally, the Mescalero Tribe has enacted a comprehensive Tribal Game and Fish Ordinance[1] pursuant to their constitution, provisions of which may be enforced by the United States of America under recent amendments to the Lacey Act, 16 U.S.C. §3371 et seq., which provide for federal civil and criminal sanctions for violating any tribal law pertaining to fish, wildlife, or plants. This statute passed in November of 1981 demonstrates strong Congressional support for tribal police power over its game, fish and plant life.

Related to this statute is 18 U.S.C. §1165 which provides for federal criminal

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[1] These tribal ordinances have the effect of federal law when ratified by the Secretary of the Interior and should enjoy the protection of the Supremacy Clause. United States v. Mazurie, 419 U.S. 544, 95 S.Ct. 710, 717, 42 L.Ed 2d 706 (1975).

sanctions against persons trespassing on tribal trust lands for purposes of hunting and fishing. The apparent intent of Congress in 18 U.S.C. §1165 was to insure tribal jurisdiction over non-Indians on all land within a reservation. In discussing H.R. 4386, which eventually became 18 U.S.C. §1165, Representative Libonati said:

> "Mr. Speaker, this legislation is for the purpose of placing under tribal law the right to prosecute whites. Under the tribal laws they can only prosecute Indians."

105 Cong. Rec. 13713 (July 20, 1959).

In terms of economic self-sufficiency and tribal self-determination Congress has expressed strong support for tribal control, development, management and utilization of reservation natural resources to achieve those goals. See Indian Financing Act of 1974, 25 U.S.C. §§1451 et seq., the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§450

et seq., the Indian Child Welfare Act, 25 U.S.C. §§1901, et seq, and other federal statutes noted in White Mountain Apache Tribe v. Bracker, supra., at 143, N.10, which together express "a firm federal policy of promoting tribal self-sufficiency and economic development." Id. and assumption by the federal government through these statutes and treaties, a fiduciary duty for the protection and preservation of Indian tribes and their resources.

This Congressional policy has recently been reaffirmed by President Reagan's statement on Indian Policy, issued on January 24, 1983, which comitted the Executive Branch to the Federal Policy of promoting tribal self-sufficiency, economic development and tribal independence. 19 Weekly Compilation of Presidential Documents (January 31, 1983).

D. State Interests Are Restricted By Operation of Federal and State Statutes on the Mescalero Apache Reservation and its Natural Resources.

In addition to the formidable array of facts in the record reflecting de minimus state contribution and legitimate interest in hunting and fishing by non-Indians on the Mescalero Apache Reservation, there exist federal and state statutory barriers against New Mexico's attempt to regulate the tribe's utilization of its natural resources.

The New Mexico Enabling Act, 36 Stat. 557, upon which New Mexico's admission into the Union was conditioned, "forever disclaims all right and title" to lands owned or held by the Mescalero Apache Tribe and declares that such lands "shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of

the United States." Id. The Enabling Act prohibits state proprietary and regulatory control, claims, and jurisdiction over such Indian lands. McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973); Fisher v. District Ct., 424 U.S. 382, 386 and N.8 (1976); Williams v. Lee, 358 U.S. 217, 220-23, N.10 (1959); Williams v. United States, 327 U.S. 711, 714, N. 10 (1940); Northern Cheyenne, etc., v. Adsit, ____ F.2d ____ (9th Cir., 1982).

Public Law 280, Act of August 15, 1953, 67 Stat. 588, provided states the opportunity to obtain civil jurisdiction over Indian Tribes but the State of New Mexico never availed itself of that opportunity. A negative inference is certainly appropriate to make based upon its failure to adopt Public Law 280 and the concomitant responsibility its adoption would have entailed toward Indian Tribes in New Mexico.

Presently, the State of New Mexico unlike the United States, has no trust responsibility or duty to the Mescalero Apache Tribe or its land, water and natural resources.

The State of New Mexico by its enforcement of state licensing requirements on non-Indians hunting and fishing on the Mescalero Apache Reservation is seeking to diminish the tribe's proprietary authority over its land, water and tribal natural resources including game and fish. As discussed, infra, federal policy embodied in the creation of the reservation and as expounded by this Court in United States v. Winters, 207 U.S. 564, 576, 78 S.Ct. 207, 211, 526 L.Ed 340 (1908) and its progeny, preclude any state intrusion or interference with the tribe's reserved rights to its natural resources, land and water, and their utilization.

E. State Attempts to Require Licensing of Non-Indians To Hunt and Fish on the Mescalero Apache Reservation are Barred by Application of the Winters Doctrine.[2]

The hunting and fishing permits issued by the Mescalero Apache Tribe grant by implication permission to non-Indians to enter upon and through the reservation to engage in those activities. Only the Mescalero Apache Tribe can consent to such entry. The State of New Mexico concedes that the fishing and hunting permit issued by the State of New Mexico is valueless without tribal assent. It is difficult to accept New Mexico's argument that a state license is required when nothing is bestowed upon

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[2] United States v. Winters, 207 U.S. 564, 576, 78 S.Ct. 207, 211, 526 L.Ed 340 (1908)

the non-Indians by its purchase.

This situation is similar to that litigated in Colville Confederated Tribes v. Walton, 647 F.2d 42, 51 (1981). In that case, Walton, a non-Indian purchaser of an Indian allotment, claimed a right to use a certain quantity of water by virtue of water permits issued by the State of Washington. Id. at 51.

Citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143, 100 S.Ct. 2578, 2583; White Mountain Apache Tribe v. Arizona, 649 F.2d 1274 (9th Cir., 1981), the Ninth Circuit held that the State of Washington had no power to regulate water in the water system in issue and that the permits were of no force and effect. The Court reasoned that state regulation of water on the reservation was preempted by the creation of the Colville Reservation. (Emphasis added) Further, that where land

is set aside for an Indian Reservation, Congress has reserved it for federal as opposed to state needs. Colville Confederated Tribes v. Walton, supra., at 52-53.

The Walton Court further held, citing United States v. Montana, ___ U.S. ____, 101 S.Ct. 1245, 1257, 67 L.Ed 2d 493 (1981), that the Colville Tribes retained the inherent power to exercise civil authority over the conduct of non-Indians even on fee lands within its reservation when that conduct threatens or has some direct effect on the health and welfare of the tribe. Colville Confederated Tribes v. Walton, supra. at 52. This includes conduct that involves the tribe's water rights. United States v. Montana, supra, N.15.

The waters of the Mescalero Apache Reservation like those on the Colville Reservation were reserved to the tribe upon creation of the reservation. United States v. Winters,

207 U.S. 564, 576, 78 S.Ct. 207, 211, 526 L.Ed 340 (1908); Cappaert v. United States, 426, U.S. 128, 139, 96 S.Ct. 2062, 2061, 48 L.Ed 2d 523 (1976); Arizona v. California, 373 U.S. 546, 598, 83 S.Ct. 1468, 1496, 10 L.Ed 2d 542 (1963). Permitting Indians to determine how to use reserved waters has been held consistent with the general purpose for the creation of an Indian Reservation; providing a homeland for the survival and growth of the Indians and their way of life. Colville Confederated Tribes v. Walton, supra at 49.

Conflicting regulations imposed by the State of New Mexico on the use of the trout fishery and game of the reservation will have a direct effect on the tribe's use of this resource. The regulation of water on a reservation is critical to the lifestyle of its residents and the development of its resources. Id at 52. Its regulation is an

important sovereign power. Id.

In another tribal sovereignty case involving the power of a tribe to enact a tribal zoning code adopted by the Shoshone and Arapahoe Tribes, the Tenth Circuit, in response to a non-Indian developer alleging that the tribes had no authority to enact the zoning ordinance stated:

> "We disagree, Indian Tribes have 'attributes of sovereignty over both their members and their territory.' . . . included in the tribal power is 'a broad measure of civil jurisdiction over the activities of non-Indians on Indian Reservation lands in which the tribes have a significant interest."

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152-153, cited by Knight v. Shoshone and Arapahoe Indian Tribes, Slip Op. at p. 5, No. 80-1810 (10th Cir., Feb. 8, 1982).

The case for substantial tribal interests of the Mescalero Tribe is even stronger when it is considered that the Walton case, supra,

involved fee land within the boundaries of the reservation, while the waters and other natural resources reserved for the Mescelero Apache Tribe, and the conflict in this case over their use and regulation, all occur entirely within trust land owned by the Mescalero Apache Tribe.

II. NEW MEXICO'S REGULATION AND LICENSING OF NON - INDIAN HUNTING AND FISHING ON THE RESERVATION INFRINGES UPON TRIBAL SELF-GOVERNMENT.

This Court held, in White Mountain Apache Tribe v. Bracker, 448 U.S. at 143 (1980) and recently reaffirmed in Ramah Navajo School Board v. Bureau of Revenue of New Mexico, ____ U.S. ____, 102 S.Ct. 3394 (1982), that the fact that a state action interferes with a tribe's ability to exercise its sovereign functions". . . standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the

reservation. . . " since Indian Tribes are "a good deal more than 'private voluntary organizations'" and since they are "unique aggregations possessing attributes of sovereignty over both their members and their territory," [citations omitted] Merrion v. Jicarilla, __ U.S. ___, 102 S.Ct. at 903 (1982). This Court held in Merrion that a tribe's authority to tax non-Indians derived not only from its power to exclude them, but also from the necessity of such authority to "tribal self-government and territorial management." Id.

The power of a tribe to govern itself and its territory is one of the incidents of its inherent sovereignty. Just as the parameters of a tribe's retained sovereignty vary depending upon the particular aspect of such sovereignty which is examined, so too do the parameters of self-government; for self-government consists of the institutions by

which a people exercise their sovereignty to manage their relations and their territory.

An examination of the cases of this Court reveals that tribal self-government is not a monolithic phenomenon which is simply defined for all purposes, but rather is a mosaic of separate institutions, some of which tribes have retained, and some of which have been lost. For example, when this Court decided, in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978) that the power of an Indian Tribe to exercise criminal jurisdiction over non-Indians within its borders would be inconsistent with its dependent status, this Court defined not only the limits of a particular facet of the tribe's sovereignty, but also the limits of particular institutions of its self-government and territorial management. And when, in Montana v. United States, 450 U.S. 544, (1981), this Court held that the Crow Tribe had not retained

the inherent sovereign authority to regulate hunting and fishing by non-members on non-tribal fee lands within their reservation, the effect was to prohibit that particular aspect of tribal self-government and territorial management. In the same case, however, this Court confirmed that a tribe's sovereign power, and thus its civil jurisdiction, a component of its self-government, does extend to non-Indians even on non-Indian fee land within the reservation, "who enter consensual relationships with the tribe. . ." or whose conduct "threatens or has some direct effect on the political integrity, economic security, or the health or welfare of the tribe." Id., at 564-565 [3]. In view of these cases, and the many others which

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[3] Montana did not directly address the situation present in this case, where the non-Indian activity takes place on Indian trust land, but its language clearly implies that the tribe has at least such civil jurisdiction on Indian trust land.

delimit the bounds of various aspects of tribal sovereignty, and thus self-government, the implied and express assertions of New Mexico and the amici curiae states that tribal self-government extends only to the governing of Indians, and, at most to the exclusion of non-Indians, are without merit.

A tribe's powers of self-government vary, depending, among other things, upon the fee or trust status and ownership of the reservation lands, the Congressional enactments, executive orders and federal policies regarding the particular aspect of self-government under scrutiny, and the historical relationship which that aspect of self-government bears to the purposes for which the reservation was created.[4] Therefore, a particular-

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[4] In Montana v. United States, supra, at footnote 15, the Court noted, as a corollary, that "Indian Tribes retain rights to river waters necessary to make their reservations livable," citing Arizona v. California, 373 U.S. 546. The tribes also must retain the powers of self-government necessary to implement those rights.

ized inquiry is as necessary to the "infringement of self-government" test, as Bracker, supra, found it to be to the preemption test. For the purposes of the infringement test, however, what must be examined is the nature of the particular aspect of self-government which faces potential infringement.

In the instant case, New Mexico and the amici curiae states of Arizona, Washington, and Utah have sought to obscure the impact of state regulations on tribal self-government by characterizing this as "merely" a case of alleged injury to the tribe's economy,[5] and one dealing with the

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[5] Amicus curiae White Mountain Apache Tribe concurs with Respondent Mescalero Apache Tribe's argument regarding economic injury to its ability to govern itself and with Respondent's argument distinguishing this case from the Colville cigarette case. The value taxed (or the privilege sold) by New Mexico is generated on the reservation from resources reserved to the tribe upon the creation of the reservation. Amici curiae Arizona and Wash-

relationship between New Mexico and non-Indians. In fact, the facet of tribal self-government most egregiously infringed upon is the tribe's ability to fulfill its trust responsibility to its members to manage the fish and game natural resources of the reservation for the benefit of those members. The Tenth Circuit Court of Appeals properly recognized the unique importance of the fish and game and habitat management aspects of tribal self-government in its decisions below. Mescalero Apache Tribe v. New Mexico, 630 F.2d 724 (1980), 677 F.2d 55 (1982). Since the Respondent Tribe has cogently explained the special importance of this aspect of

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ton's comparison of lakes created on the reservation with reserved waters to a shopping center, and their comparison of fish to cigarettes proves the unwillingness of the amici curiae states to acknowledge even the most basic principles of federal Indian law. Indeed, the states still seek to appropriate tribal resources to their own use with alarming regularity.

tribal self-government, amicus curiae White Mountain Apache Tribe merely refers the Court to their brief on this issue. Worth emphasizing, however, is the fact that while New Mexico is bound by state statute to regulate and manage the game and fish within its jurisdiction for the benefit of all the people of the state, and, if given the power to regulate game and fish on the reservation would do so for the benefit of that constituency, such use of the resources of the reservation is contrary to the purposes for which the reservation was established.

Arizona and Washington claim that New Mexico and other states "only" seek to ensure that their regulations are enforced when they are more restrictive than a tribe's, and that the states do not seek to authorize activities the tribe would prohibit. This assertion misses the point.

The tribes have the right and the need in managing their use of their resources to authorize any such use subject only to constraints imposed or authorized by the federal government. This Court noted in Merrion v. Jicarilla, supra, that:

> ". . .the tribe's authority to tax non-members is subject to constraints not imposed on other governmental entities: the federal government can take away this power, and the tribe must obtain the approval of the Secretary before any tax on non-members can take effect. These additional constraints minimize potential concern that Indian tribes will exercise the power to tax in an unfair or unprincipled manner, and ensure that any exercise of the tribal power to tax will be consistent with national policies."

102 S.Ct. at 903. The same exact constraints apply to the regulation of the game and fish resources of Indian reservations. The resource is thus amply protected even from the unlikely situation of abuse by an irresponsible tribe. The

facts in the instant case, however, reveal a joint tribal and federal game and fish management program of the highest professional quality, and there is no justification for the imposition of more restrictive standards on the tribe's program of resource self-government. The authorization of the taking of game or fish is an important a management tool as is the restriction of taking. For example, if there is an overabundance of a particular species on the reservation, the tribe may need to reduce its numbers by authorizing a particular harvest. Harvest of a smaller number would be detrimental to the species and its habitat. Similarly, reservation conditions may require a longer, or different hunting or fishing season than that authorized by the state. Only the tribe, with its staff of field personnel and its biologist, and with

federal advisors, is in a position to evaluate the factors on the reservation and make appropriate recommendations to the Tribal Council. Only the Tribal Council can exercise the trust responsibility of setting regulations in such a way as to maximize the benefit of the resources to tribal members, while preserving reservation resources for future generations.

The amici curiae states make much of the movement of animals across the borders of the reservation, and insist that in view of this movement, states must be able to control on-reservation hunting and fishing by non-Indians. Arizona and Washington's reference, however, to wildlife being "fluid" points to the flaw in their reasoning. The fluid nature of the water reserved to the tribes upon the creation of reservations, Winters v.

United States, 207 U.S. 564 (1908), Arizona v. California, 373 U.S. 546 (1963) does not give states a right to regulate reservation water use. Neither does the fluid nature of game and fish permit New Mexico to interfere with tribal management of the game and fish resources of the Mescalero Apache Tribe, resources similarly reserved to the tribe. Nothing in the record of the case at bar indicates that New Mexico's inability to control non-Indian hunting and fishing on the reservation has injured the resource either on or off the reservation. The record in fact reflects the high quality of the tribe's management, and a possible benefit to New Mexico in the form of migratory elk. Jt. App. 214a.

Much has been said by New Mexico and the amici curiae states regarding the ecosystem in which the game and fish live,

and the necessity for uniform management. While thus appearing to invoke the sanctity of biological holism, the states evade the truth: the tribe, under federal supervision, is the only governmental entity which has the jurisdiction to regulate all aspects of the game and fish and their habitat of the reservation. Only the tribe can regulate the hunting and fishing of tribal members on the reservation. Likewise, only the tribe can regulate the grazing of cattle and the harvest of timber, two very important aspects of habitat management for game animals and fish. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Similarly, only the tribe can close a critical habitat area to all access. Only the tribe can authorize the taking of game and fish and only the tribe can authorize their planting. Thus, while reciting the ecosystem litany, New Mexico fails to

reveal that even if it were to win this lawsuit, all it could do with respect to managing the reservation hunting and fishing resources, which are inseparable from their habitat, is control their harvest by non-Indians. This injection of partial state authority into the tribe's integrated comprehensive system of resource management would infringe upon the tribe's right to govern one of the most important aspects of its reserved resources.

For all of the above reasons, and for those stated in the briefs of Mescalero Apache Tribe and amicus curiae United States, the White Mountain Apache Tribe believes that New Mexico's regulation of non-Indian hunting and fishing on the Mescalero Apache Reservation would impermissibly infringe upon the tribe's program of hunting and fishing resource self-government.

CONCLUSION

For the reasons stated, the decision of the Tenth Circuit Court of Appeals should be affirmed.

RESPECTFULLY SUBMITTED,

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No. 82-331

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF NEW MEXICO, ET AL., PETITIONERS

v.

MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a State may superimpose its fish and game laws on hunting and fishing by non-Indians on tribal lands within an Indian Reservation, where the Tribe extensively regulates those activities and has developed the wildlife resource with substantial federal aid, but none from the State, and the Tribe's program has no significant impact off the Reservation.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-331

STATE OF NEW MEXICO, ET AL., PETITIONERS

v.

MESCALERO APACHE TRIBE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING RESPONDENT

The interest of the United States in this case arises from its special relationship with the Indian Tribes, its obligation to implement a treaty, Executive Orders setting aside the Mescalero Reservation, and Congressional legislation encouraging tribal self-government and economic self-sufficiency, as well as the substantial involvement of the federal government with the tribal enterprise immediately involved.

STATEMENT

1. The Mescalero Apache Tribe, with more than 2,000 members, is a federally-recognized Indian tribe, governed by a constitution adopted pursuant to the Indian Reorganization Act, 25 U.S.C. 461 *et seq.* The Mescalero are a branch of the Apache Nation which entered into a Treaty with the United States on July 1, 1852. 10 Stat. 979; J.A. 28a-33a. Under Article 1 of the Treaty (J.A.

29a), the Apache acknowledged that they were "exclusively under the laws, jurisdiction and government of the United States." By Article 9 (J.A. 30-31a), the United States promised to "designate, settle, and adjust" the territorial boundaries of the Apache.

The Reservation now occupied by the Mescalero Tribe in south central New Mexico was created by a succession of Executive Orders promulgated in the 1870s and 1880s. 1 Kappler, *Indian Affairs, Law and Treaties* 870-873 (1904), J.A. 34a-40a.[1] It is a small portion of the aboriginal Mescalero domain (1978 Tr. 38; J.A. 184a),[2] which once encompassed most of southern New Mexico between the Rio Grande and Pecos Rivers, as well as a sizable triangle east of the Pecos. See *Mescalero Apache Tribe* v. *United States*, 17 Ind. Cl. Comm. 100, 146-148, 159-161 (1966). The present Reservation comprises more than 460,000 acres and, according to 1982 figures, the Tribe owns all but 193.85 acres.[3] The 1980 census indi-

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[1] The final boundaries were fixed by the Executive Order of Mar. 24, 1883 (J.A. 38a-39a). Later, portions of the Reservation were briefly included in a National Forest, but that area was restored to the Mescalero Reservation by the Executive Order of Feb. 17, 1912 (J.A. 39a-40a). An intervening Executive Order of Mar. 1, 1910 (J.A. 39a) exempted from the Reservation two "small holdings claims" on the Tularosa River totalling approximately 262 acres, apparently representing settlements located before the establishment of the Reservation. The Tribe has since purchased all but 23.8 acres of the lands covered by these claims. See also note 3, *infra*.

[2] Two hearings were held before the district court, one on August 19, 1977, and the second on April 25, 1978. The transcripts of these hearings will be cited as "1977 Tr." and "1978 Tr.", respectively, and, as to portions reprinted in the Joint Appendix, also to the page of the J.A.

[3] These lands comprise: (1) the 23.8 acres remaining of the "small holdings claims" exempted from the Reservation in 1910 (see note 1, *supra*); 10 acres at the Mescalero Agency granted to St. Joseph's Catholic Church by the Act of Mar. 29, 1928, ch. 299, 45 Stat. 1716; and the unimproved and unoccupied 160 acre "Dodson Tract" in the northwest portion of the Reservation. The State has

cates a non-Indian population of 179 (including resident federal employees of the Bureau of Indian Affairs and the Indian Health Service), out of a total of more than 2,000.

2. Recently, the Tribe has undertaken a substantial effort to develop tourism on the Reservation, partially in order to offset an anticipated decline in the income derived from lumbering enterprises (1977 Tr. 10-13, 56-58; J.A. 113a-117a, 143a). This has included construction of a resort complex, the Inn of Mountain Gods, which consists of a hotel, stocked lake, golf course, tennis courts, and a swimming pool (Br. in Opp. App. 6a-10a).[4] Construction of the complex was financed primarily by federal funds (*id.* at 7a-8a).

As an integral part of its tourism program, the Tribe has developed its hunting and fishing resources. In addition to the sale of licenses alone (Br. in Opp. App. 11a), the Tribe also sells "package hunts" which include both tribal licenses to kill big game, and accommodations at the Inn (*id.* at 9a). The sale of licenses alone and the sale of package hunts, in turn, generate ancillary income from family members who stay at the Inn, but do not hunt or fish (1977 Tr. 57; J.A. 143a). The tourism program provides employment for Tribe members and creates income for the Tribe which is used to maintain the tribal government and provide services to Tribe members (1977 Tr. 13; J.A. 115a). Income derived from the sale of tribal hunting and fishing licenses, package hunts, and campground and picnicking permits totalled $269,140.00 in 1976 and $271,520.00 in 1977 (Br. in Opp. App. 37a).

Fishing resources located on the Reservation were created almost entirely by the Tribe and the United States. Because there were no natural lakes on the Reservation,

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not suggested that any of the hunting or fishing at issue here occurs on these small parcels.

[4] In addition to the evidence presented at the two hearings, the parties entered into a stipulation, reproduced as an appendix to the Tribe's Brief in Opposition. We cite to that appendix as "Br. in Opp. App."

eight artificial lakes were developed, using federal funds (Br. in Opp. App. 13a; 1977 Tr. 11; J.A. 114a). These lakes are stocked with fish from a federal hatchery located on the Reservation (Br. in Opp. App. 12a-13a, 14a). The State has never stocked lakes on the Reservation, although before 1976 the State had stocked part of one Reservation stream and prior to 1970 it stocked more than one stream (*id.* at 14a). At present, however, all waters on the Reservation are stocked exclusively with fish from the federal hatchery (*ibid.*). The State contributes nothing to the operation of the hatchery, nor does it help maintain the artificial lakes (1977 Tr. 15; J.A. 117a).

Game on the Reservation includes elk, antelope, bear and deer. From "time immemorial" the Tribe has been concerned about wild game on its land (1977 Tr. 7; J.A. 110a). The Tribe is interested in the "protection and preservation" of the game and in generating income from this resource (1977 Tr. 10; J.A. 113a). The antelope living on the Reservation are non-migratory and seldom, if ever venture beyond Reservation boundaries (Br. in Opp. App. 15a). Portions of the deer, elk and bear populations, however, do range on and off the Reservation throughout the year (*id.* at 15a). William S. Huey, New Mexico's director of Fish and Game, testified that there has been no adverse impact on the State's game program caused by the migrating animals (1978 Tr. 62, 68; J.A. 201a, 206a).

Due to the efforts of the Tribe and the United States, the elk population increased dramatically in the decade between 1967 and 1977 (Br. in Opp. App. 14a-15a). Prior to 1966, only 13 elk lived in the vicinity of the Reservation. In 1966 and 1967, the Tribe released a herd of 162 elk, donated by the National Park Service (*ibid.*). As a result of these efforts, the 1977 elk population numbered approximately 1,200 (*id.* at 15a). The State has made no financial contribution to the development of the elk herd (1977 Tr. 107-108).

3. Pursuant to its constitution, the Tribe, through its tribal council, enacts annual ordinances governing hunting and fishing on the Reservation (*e.g.*, J.A. 76a-87a). These tribal ordinances establish seasons and bag limits and provide for licensing of hunting and fishing on the Reservation (*ibid.*; 1977 Tr. 16-17; J.A. 118a). Since 1977, the ordinances have specified that state hunting and fishing licenses are not required for Indians or non-Indians who hunt or fish on the Reservation (Br. in Opp. App. 10a). The ordinances have been approved by the Department of the Interior (J.A. 92a; Pet. App. 39a). The Tribe employs seven full-time conservation officers to manage the fish and game and to enforce tribal ordinances, all of whom have received training in wildlife management and in law enforcement (Br. in Opp. App. 11a-12a). These officers recommend to the tribal council bag limits and season dates (*ibid.*). In developing recommendations, the Tribe's conservation officers conduct annual game counts and survey game movements (*ibid.*; 1977 Tr. 17, 62-63; J.A. 118a-147a). These surveys are carried out in cooperation with the Bureau of Indian Affairs and the Range Conservation Department (1977 Tr. 63; J.A. 147a). Recommended bag limits are based on conservation needs (1977 Tr. 17; J.A. 118a) and take into account the number of animals the terrain can support (1977 Tr. 70; J.A. 153a). The bag limits and season dates also include consideration of the range utilization of the game animals, of feral horses which roam the Reservation, and of the Tribe's herd of cattle (1977 Tr. 71-74; J.A. 154a-156a). The Tribe has conserved its wildlife resources by turning down many applications for big game licenses and package hunts (Br. in Opp. App. 36a).

The State admits (Br. in Opp. App. 35a) that

> [T]he hunting and fishing ordinances of the Tribe presently maintain the fish and wildlife populations within the Reservation at levels consistent with good management and have not had an adverse impact on fish and wildlife outside the Reservation.

The number of tribal hunting licenses was termed "insignificant" by the State's director of the Fish and Game Department, when compared to the number of state licenses issued (1977 Tr. 113-114). In years past, when state licenses were issued for on-Reservation hunting, elk licenses numbered 50 out of a state total of 14,000; antelope licenses numbered 10 out of 3,500 state-wide licenses; and deer licenses amounted to 175 out of 100,000 state deer licenses (*ibid.*).[5]

4. Conflicts exist between state and tribal hunting regulations. Unlike the State, the Tribe permits one person to purchase an elk license in two consecutive years (Br. in Opp. App. 26a). The State limits its elk licenses in order to spread the opportunity to kill elk among various hunters; its limitation is not related to elk population conservation or management (1978 Tr. 69; J.A. 206a). In 1977, the dates of the Tribe's antelope season varied from the State's antelope season (1977 Tr. 28-31; J.A. 127a-129a). The State's director of its Fish and Game Department testified that "[t]here is no biological significance" in the different antelope season dates (1977 Tr. 96-97). Another difference between regulatory schemes concerns the buck-doe ratio of deer licenses issued (1977 Tr. 71-72; J.A. 153a-154a). While the State permits only buck to be killed, the Tribe allows a hunter to kill a buck and a doe (*ibid.*). This keeps the buck-doe ratio in balance and, in turn, curbs excessive deer population growth (*ibid.*).

At least three persons have been charged by the State for illegal possession of game killed on the Reservation in accordance with tribal law (1977 Tr. 99-100). In 1976, two hunters were fined $600.00 each by the State for possession of a bull elk which had been killed on the Reserva-

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[5] The Tenth Circuit stated that "in a recent year" the Tribe sold 500 deer licenses. Pet. App. 12a n.5. Since the other figures recited appear to derive from the same testimony recited in the text, we assume this was an inadvertant error. At all events, 500 licenses out of 100,000 would remain "insignificant."

tion in compliance with tribal law (1977 Tr. 22, 48-50; Br. in Opp. App. 30a-31a). These two men had purchased tribal hunting licenses in 1975 and 1976, but did not apply for licenses in 1977 (1977 Tr. 60-61; J.A. 145a-146a). News of the fines was carried in the county papers (1977 Tr. 22; J.A. 122a). The Tribe is concerned that state enforcement of conflicting laws will injure the Tribe's reputation, damage its good will, and result in lost income due to a decline in the sale of tribal hunting licenses (1977 Tr. 21-22; J.A. 121a).

5. The State's interest in this case is, at least in part, financial. Federal matching funds through the Pittman-Robinson Act, 16 U.S.C. 669 (hunting), and the Dingle-Johnson Act, 16 U.S.C. 777 (fishing), are allocated to States through a formula which considers the number of license-buyers and the number of acres in the State (Br. in Opp. App. 17a). The territory of the Mescalero Reservation is taken into account in determining New Mexico's share of matching funds (*ibid.*). The number of state-licensed hunters and fishers is also considered in the calculation (*ibid.*). The State has expressed concern that, if state licenses were not required for on-Reservation hunting and fishing, it might lose some federal funds (1977 Tr. 94) and revenue from the sale of state licenses (*ibid.*; 1978 Tr. 53; J.A. 194a). On the other hand, New Mexico stipulated that it has expended no Dingle-Johnson funds for projects within the Reservation during the last six to eight years (Br. in Opp. App. 17a-18a), and it presented no evidence as to expenditures of Pittman-Robinson funds within the Reservation.

6. In 1977, the Tribe filed suit against the State and the director of its Fish and Game Department seeking declaratory and injunctive relief. The Tribe sought to prevent the State from regulating or taxing on-Reservation hunting of fishing by Indians or non-Indians. The district court, on August 2, 1978, ruled in favor of the Tribe. Pet. App. 35a-36a, 37a-53a; J.A. iv-v. The State appealed and the court of appeals affirmed, 630 F.2d 724 (10th Cir.

1980). Pet. App. 8a-34a. New Mexico petitioned for a writ of certiorari and this Court vacated the Tenth Circuit's judgment, 450 U.S. 1036 (1981), and remanded the case to that court for reconsideration in light of *Montana* v. *United States*, 450 U.S. 544 (1981). On remand, the court of appeals again affirmed the district court's decision and ordered its own previous decision reinstated, 677 F.2d 55 (10th Cir. 1982). Pet. App. 2a-3a, 4a-7a. This Court granted New Mexico's second petition for a writ of certiorari on November 15, 1982.

ARGUMENT

INTRODUCTION AND SUMMARY

If argument from the facts alone is ever permissible in this Court, here is such a case. Consider the history underlying this controversy: An Indian Tribe, overwhelmed by the forces of Manifest Destiny and deprived of most of its territory without agreement, is confined to lands of natural beauty but inhospitable and unwanted by white settlers; separated from much of their game range, the members are broken of their free-roaming ways and effectively reduced to beggary.[6] Fortunately, the rugged

[6] The details do not reflect well on the government of the United States or the local authorities of the Territory of New Mexico. In very brief summary, the early history is the following. Shortly after the Mexican Cession of 1848, the Territory of New Mexico was organized (Act of Sept. 9, 1850, ch. 49, 9 Stat. 446), and the Indian Trade and Intercourse Act was extended to the new territory (Act of Feb. 27, 1851, ch. 14, 9 Stat. 574), so that, in principle, aboriginal Indian lands were protected against unauthorized appropriation and trespass. See *Mescalero Apache Tribe* v. *United States*, 17 Ind. Cl. Comm. 100, 112-113 (1966). By the Treaty of 1852 (J.A. 28a-31a), the Apache, including the Mescalero, acknowledged their submission to federal authority in return for a promise of protection and a settlement and recognition of their boundaries. See J.A. 169a-172a. But the Government's undertakings remained unfulfilled and the Mescalero were pursued and defeated. See C.L. Sonnichsen, *The Mescalero Apache* 77-78 (2d ed. 1973); see, also J.A. 173a-174a. Three years later, the subdued Mescalero Tribe signed a further treaty with the United States, ceding most of their

terrain, part mountain, part desert, part rough plain, lacking valuable mineral resources and containing few streams and little desirable farming land, insulates the Reservation both from subdivision by allotment among

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lands in consideration of modest annuities and a defined Reservation several times the size of the present area. J.A. 96a-110a, 174a. That agreement was ineffective, however, never having been ratified. 17 Ind. Cl. Comm. at 115-116. Instead, the most valuable of the Mescalero lands were simply taken without formality or payment by white settlers with the encouragement of the Government, which sometimes lent its military arm to the task. 17 Ind. Cl. Comm. at 142-143. Depredations on both sides continued, the Mescalero were once again reduced and, in 1861, they again agreed to a partial cession of their aboriginal domain, retaining, however, a larger territory than was provided for in the unratified 1855 treaty. 17 Ind. Cl. Comm. at 143. But the agreement was not approved at the higher federal level (*id.* at 143-144) and the decision was taken to confine the Mescalero at the Bosque Redondo, a remote area northeast of the present Reservation with poor land and bad water. J.A. 176a; Sonnichsen, *supra*, at 89-114. Soon, the much more numerous Navajos were sent there as well and conditions became so appalling by the winter of 1865 that the entire Mescalero Tribe determined upon escape. J.A. 176a; Sonnichsen, *supra*, at 115-133; 17 Ind. Cl. Comm. at 117. Finally, in May, 1873, the President formally established a Mescalero Reservation, then comprising about 450 square miles. J.A. 35a-36a, 177a-178a. Thus, without agreement or compensation, the Tribe irrevocably lost all the rest of its territory. 17 Ind. Cl. Comm. at 145. Considerable acreage was added the next year (J.A. 36a) and the boundaries were more accurately defined in 1875 (J.A. 37a). However, valuable mineral deposits were discovered in the northern and western portion of the Reservation and, at the instance of miners and settlers, these areas were severed and about half as much non-mineral land was added on the eastern side by an Executive Order of 1882. J.A. 37a-38a; Sonnichsen, *supra*, at 233-234. The final boundaries were more accurately described in 1883 (J.A. 38a-39a), subject only to the exception from the Reservation of certain small tracts by an Executive Order of 1910. J.A. 39a; see note 1, *supra*. Until the turn of the Century, the Mescalero lived entirely on meager government "rations." Sonnichsen, *supra*, at 230-254. For the next thirty years, the Tribe was deemed "self-sustaining," but the members continued to live in relative poverty, having virtually no control over the revenues that were eventually earned from timber sales and grazing leases. Sonnichsen, *supra*, at 255-269.

members and "opening up" of "surplus" lands to outsiders—so common elsewhere in Indian country—and its tribal status is preserved.[7] Then, very belatedly, the Tribe's "protector" generously contributes money and other help toward several projects, most recently to make possible a tribal enterprise involving a large game and fishing resort; the United States provides an elk herd, a fish hatchery and technical assistance; the State of New Mexico "encourages" the project and "permits" the importation of elk, but makes no tangible contribution, financial or otherwise; the Tribe builds the resort, creates several artificial lakes, develops the game and fishery resource, and successfully organizes a tourist business, committing substantial funds and personnel to the task.

The State concedes that the Tribe's fish and game management is sound and that, in respect of the deer, elk and bear that sometimes migrate off the Reservation, the Tribe's operation creates no adverse impact; indeed, the Tribe's development and conservation of the migrating species only add to the opportunities available to off-Reservation hunters. Nor is it suggested that the State's revenues from off-Reservation huting or fishing licenses are lesened by the Tribe's relatively minimal sale of licenses.[8] Yet, New Mexico—having been permitted to tax the construction of the resort (see *Mescalero Apache*

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[7] See *e.g.*, the report of the Superintendent for 1900, annexed to the Report of the Commissioner of Indian Affairs, *reprinted in Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900*, H.R. Doc. No. 5, 56th Cong., 2d Sess. 285-291 (1900).

[8] It *is* said that New Mexico's share of Pittman-Robinson Act and Dingle-Johnson Act federal funds is less because the Mescalero Reservation acreage is counted in the apportionment formula while the Tribe's hunting and fishing licenses are not. See Br. in Opp. App. 17a-18a, 23a-25a. However, since the Mescalero Reservation accounts for only .0059 per cent of the total area of the State (*id.* at 24a), the effect is obviously insignificant. At all events, the record indicates that none of these federal funds is spent within the Reservation. *Id.* at 17a-18a.

Tribe v. *O'Cheskey*, 625 F.2d 967 (10th Cir. 1980), cert. denied, 450 U.S. 959 (1981)), as well as the Tribe's income from a neighboring off-Reservation ski operation (see *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973))—now seeks to regulate and tax hunting and fishing by non-Indians on tribal lands within the Reservation; no necessity, no serious justification, no substantial interest, is alleged, except only a claim to share in the revenues. On the other hand, applying State regulation creates needless conflicts with the Tribe's program—in respect to open and closed seasons, bag limits, and the allocation of licenses—which, together with the exaction of State license fees (in addition to those prescribed by the Tribe), predictably will discourage some hunters and fishermen and thereby may substantially diminish tribal revenues.

Even in the absence of governing treaties and statutes and of controlling judicial precedents, applicable in the special context of Indian law, one would suppose that New Mexico had overstepped the line of its legitimate authority and intruded upon insulated activities within the tribal domain which are fully, and quite satisfactorily, regulated by the Tribe, with the help and oversight of the federal government, in a way that excuses the State from any responsibility, gives no cause for concern and offers no pretext for intervention. See, *e.g.*, the Opinion of Justice Powell, concurring in the Court's decision of *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), reported at, *id.* at 173-175; and the Dissenting Opinion of Justice Stevens (joined by Justices Stewart and Rehnquist) in the same case, *id.* at 157-158 and n.7. But this is not merely a case in which the Court is asked "to indulge [its] sympathies." Compare *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 15 (1831). Not surprisingly, the relevant guidance from the Congress and this Court points to the same conclusion.

There are, we believe, three related grounds of objection to New Mexico's attempted regulation.

A. The first is simply that, when compared to the obvious interest of the Tribe in managing the wildlife on its

lands, including both conservation and the generation of revenues for tribal purposes, and the federal interest in furthering tribal self-government and economic self-sufficiency by aiding and encouraging the tribal enterprise, the State's claim is relatively insignificant. That is especially true here where tribal regulation is comprehensive and concededly sound, federal involvement is substantial, the State makes no contribution, and no adverse effect off the Reservation is identified. Thus, in this case, a "particularized inquiry" into the competing interests of the several governments potentially concerned yields the conclusion that New Mexico's interference is not justified.

B. In the present setting, it is clear that State regulation of non-Indian hunting and fishing on tribal lands within the Reservation would impermissibly infringe the Tribe's sovereign prerogative to govern its territory and manage the affairs of the Reservation. Here, the Tribe itself has determined to manage its wildlife resources and regulate hunting and fishing within tribal lands. It derives substantial revenues from the program, which are used for governmental purposes. The imposition of State regulation produces conflicts and potentially threatens the integrity of the tribal undertaking and the resulting income. Absent Congressional authorization or special justification—wholly lacking in this instance—the tradition of Indian sovereignty shields the Tribe from the State's claim to superimpose its own laws on localized Reservation affairs which are fully and satisfactorily regulated by tribal law.

C. Finally, we stress that the tribal program and the detailed regulations implementing it are expressly sanctioned by federal authority. Congress has authorized Indian tribes to control their wildlife resources and encouraged tribal business enterprises that lead to economic independence. In this case, moreover, the tribal undertaking was largely financed by federal funds and continues to be assisted by federal efforts. And the particular hunting and fishing ordinances have been approved by the De-

partment of the Interior. In these circumstances, tribal regulation enjoys the pre-emptive force of federal law. The comprehensiveness of the tribal hunting and fishing ordinances leaves no room for the State to impose further restrictions or additional burdens.

A. The Minimal State Interest In The Management Of Wildlife Within The Reservation, When Compared To The Predominant Tribal And Federal Interest, Forecloses State Regulation Of Hunting And Fishing On Tribal Lands

This Court has recently directed that when "a State asserts authority over the conduct of non-Indians within [an Indian] reservation," what is called for is "a particularized inquiry into the nature of the state, federal, and tribal interests at stake." *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 144-145. Accordingly, we first examine the relative claims to jurisdiction in the special context presented here.

1. There can be no doubt that governing federal law confirms to the Mescalero Tribe substantial control over the lands and the resources of its Reservation, including its wildlife, and, correspondingly, affords a degree of insulation from State interference.

The Mescalero Reservation, finally defined in 1883, was a long delayed implementation of the promise given to the several Apache Tribes by the Treaty of 1852 that, henceforth, they would be "exclusively under the laws, jurisdiction, and government of the United States" (Art. 1, J.A. 29a), and that the federal government would "at its earliest convenience designate, settle and adjust their territorial boundaries" (Art. 9, J.A. 30a-31a). As New Mexico appears to concede (Pet. Br. 12), when a small portion of the aboriginal Mescalero domain was ultimately "set apart" for the use of the Tribe, its members were confirmed in the exclusive dominion over that diminished Reservation, including its wildlife, subject only to the plenary power of the national sovereign. Nor has that legal regime been altered.

As we have said, the Reservation was neither allotted nor "opened up," and, accordingly, non-Indians were never invited in by Congress and they obtained no rights within the area under the General Allotment Act of 1887 or any special allotment legislation. When New Mexico was admitted to the Union in 1910, it expressly disclaimed "jurisdiction and control" over these and other Indian lands. Enabling Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 557, 558-559. Neither then nor thereafter did the State acquire any lands within the Reservation under the Equal Footing Doctrine, by virtue of Congressional land grants, or otherwise. Accordingly, under the trusteeship of the United States, the Tribe retains full beneficial title to all the lands of its Reservation, with the insignificant exceptions already noted. See notes 1 and 3, *supra*.

Like other Indian Tribes, the Mescalero were confirmed in their "existing powers" by the Indian Reorganization Act in 1934 (25 U.S.C. 476) and encouraged both to revitalize their government by adoption of a constitution and to engage in business enterprises. See *Mescalero Apache Tribe* v. *Jones*, *supra*. Even when the Congress of 1953 permitted States to apply their laws within Reservations, hunting and fishing were exempted. 25 U.S.C. 1321(b); 18 U.S.C. 1162(b). And, in any event, New Mexico has never assumed jurisdiction over the Mescalero Reservation under Public Law 280. See 25 U.S.C. 1321-1324. In 1960, the prerogative of the Tribes to exclude non-Indian hunters and fishermen from their lands, or to admit them on conditions, was reaffirmed and afforded the protection of the federal criminal law. 18 U.S.C. 1165. See *Montana* v. *United States*, 450 U.S. 544, 557, 558-559 (1981). Significantly, that provision—unlike the Indian liquor statute, 18 U.S.C. 1161—does not condition hunting and fishing permitted by the Tribe upon "conformity * * * with the laws of the State." In the last decade, Congress has renewed its endorsement of the "firm federal policy of promoting

tribal self-sufficiency and economic development" and "encouraging tribal independence." *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 143, 144. See, also, *Bryan* v. *Itasca County*, 426 U.S. 373, 388-389 n.14 (1976); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982); *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982), slip op. 7-8. And as recently as three weeks ago, the President reaffirmed the commitment of the Executive Branch to that policy. See the President's January 24, 1983 Statement on Indian Policy in 19 *Weekly Compilation of Presidential Documents* 98 (Jan. 31, 1983).

2. In this legislative context, it is beyond debate that, as beneficial owner of all but a quarter-section of the Reservation lands, the Mescalero Tribe enjoys a federally recognized right to control the wildlife resources of its territory, excluding or admitting non-members as it chooses. Indeed, so much is expressly confirmed by *Montana* v. *United States*, *supra*, the precedent primarily invoked by New Mexico. In the circumstances there presented, it was held that the Crow Tribe could not regulate hunting and fishing on Reservation lands *not* owned by the Tribe or its members. See 450 U.S. at 557-567.[9] There is no such question here. But, as to Indian held lands, the *Montana* Court "readily agree[d]" with the

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[9] Even so, the Court was at pains to stress that the pleadings "did not allege that non-Indian hunting and fishing on [non-Indian] reservation lands [had] impaired [the Tribe's reserved hunting and fishing privileges]" (450 U.S. at 558 n.6), or "that non-Indian hunting and fishing on fee lands imperil the subsistence or welfare of the Tribe" (*id.* at 566), and that the existing record both failed to suggest "that such non-Indian hunting and fishing * * * threaten the Tribe's political or economic security" (*ibid.*) and indicated that the Tribe had "accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation" (*id.* at 566; see, also, *id.* at 564-565 n.13). At the same time, the Court went on to state that, in different circumstances, tribal exercise of retained civil jurisdiction within the Reservation, "even on non-Indian fee lands," would be appropriate. *Id.* at 565-566.

proposition that "the Tribe may prohibit nonmembers from hunting or fishing on lands belonging to the Tribe or held by the United States in trust for the Tribe", and that "if the Tribe permits nonmembers to fish or hunt on such lands, it may condition their entry by charging a fee or establish bag and creel limits." 450 U.S. at 557. The Court in *Montana* had no occasion to consider the only real issue here: whether the State may superimpose its own regulatory scheme and exact additional license fees in respect of non-Indian hunting and fishing on tribal lands within a Reservation.

What has already been said, we submit, places a heavy burden on the State to justify any such interference. Indeed, it is meaningless to recognize a Tribe's right to manage wildlife on its lands and to license and regulate non-members invited to hunt or fish there if the State is free to nullify the tribal program by imposing inconsistent or burdensome regulations of its own, or, indeed, to prohibit the activity altogether. We do not say that State interests will never warrant restrictions on hunting and fishing by non-Indians—or even by tribal members—within a Reservation. But we believe such an intrusion must be shown to be necessary because of severely adverse off-Reservation effects that the Tribe is unwilling or unable to prevent.

3. After all, Reservation affairs, including the activities of non-Indians occurring on tribal lands and significantly involving the Indians, traditionally have been the exclusive concern of the tribal and federal governments. See, *e.g.*, *Williams* v. *Lee*, 358 U.S. 217, 223 (1959); *Warren Trading Post Co.* v. *Arizona State Tax Commission*, 380 U.S. 685, 690 (1965); *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164, 170-171 n.6 (1973); *United States* v. *Mazurie*, 419 U.S. 544, 558 (1975); and see *Merrion* v. *Jicarilla Apache Tribe*, *supra*, 455 U.S. at 137-152. At various times and in particular contexts, Congress has varied the rule. But, as we have seen, hunting and fishing is no such exception. In the absence of

special legislation, the State's interest in such activities is largely confined to the effects they may have elsewhere within State boundaries.

In extreme cases, the Reservation situs may not insulate intercourse between Indians and non-Indians from State law when the Tribe—contributing nothing except a sales outlet—is attempting to "export" a tax immunity, thereby depriving the State of substantial revenues it would otherwise earn and prejudicing competing off-Reservation businesses. See *Washington* v. *Confederated Tribes*, 447 U.S. 134 (1980). One can readily suggest other situations in which activities on tribal lands would adversely affect neighboring areas so as to implicate State interests. A sufficient example is the creation of serious pollution that reaches beyond Reservation boundaries. So, also, the State would be legitimately concerned if a Tribe's irresponsible conduct threatened the survival of migrating wildlife originating off the Reservation. Even so, it is not clear that the appropriate remedy would not be federal, rather than State, intervention. But, at all events, no such case is presented here.

In this instance, the fish and game are *native* to the Reservation, and, for the most part, would not exist except for the efforts of the Tribe and the United States. Some species never leave tribal lands, and those that occasionally do so merely *add* to the off-Reservation stock, affording otherwise unavailable opportunities to hunters elsewhere and additional license income to the State. Moreover, the Mescalero Tribe, with the assistance of federal agents, *is* conserving the resource through strict regulation, which the State is unable to label inadequate.

We understand New Mexico to concede that where, as here, there are no adverse off-Reservation effects, the State cannot license or regulate the hunting or fishing of tribal members on their Reservation lands—notwithstanding the generalized State interest in all wildlife within its borders, incidental expenditures, or the loss of revenues from licenses and federal matching programs. Yet,

it is argued that once the Tribe invites others to catch the same game and fish, State law becomes fully applicable. This anomaly is not easily understood. Indeed, if the State cannot directly manage Reservation wildlife, it is not apparent that authority to do so indirectly arises merely because non-Indians—most of them not citizens of New Mexico (Br. in Opp. App. 8a)—are licensed by the Tribe to participate in hunting and fishing under tribal regulation. One could as well argue that the Tribe's employment of non-Indians as conservation officers or game wardens would subject the wildlife program to State regulation.

B. State Regulation Of Hunting And Fishing On Reservation Tribal Lands Infringes The Right Of The Tribe To Manage Reservation Affairs

At bottom, New Mexico is refusing to acknowledge that Indian Tribes "are a good deal more than 'private, voluntary organizations'" (*United States* v. *Mazurie*, *supra*, 419 U.S. at 557), and that tribal sovereignty within a Reservation is not merely a landowner's right to exclude intruders or to charge them a fee for the privilege of entering. *Merrion* v. *Jicarilla Apache Tribe*, *supra*, 455 U.S. at 136-148. If anything is firmly settled in this Court, it is that Indian Tribes do enjoy *governmental* powers with respect to their territory, including a measure of regulatory authority over non-members who are permitted to enter for business or other purposes. In some circumstances, such invitees will be immune even from State taxes on their Reservation transactions. *E.g.*, *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*; *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160 (1980); *White Mountain Apache Tribe* v. *Bracker*, *supra*; *Warren Trading Post Co.* v. *Arizona Tax Commission*, *supra*. To be sure, this is not always so. *E.g.*, *Washington* v. *Confederated Tribes*, *supra*. But New Mexico insists that it is *regulating*, not taxing (Pet. Br. 18 n.5), and, absent special Congressional consent or

clear necessity, we are not aware that this Court has ever condoned a State attempt to *regulate* the activities of non-Indians in their intercourse with a Tribe on tribal Reservation lands.

The reason is obvious. At least in a context like the one presented here, duplicative regulation is far more intrusive than double taxation. As in this case, conflicts are inherently likely. In truth, to concede State power to regulate the same activity already governed by tribal law is to deny the Tribe any meaningful authority over its territory. Especially is this so when the subject of regulation is not an isolated transaction, but, rather, a continuing Reservation-wide program requiring comprehensive and consistent administration.

At all events, it hardly requires elaborate argument to show that granting the State an effective veto over a Tribe's management of its wildlife operations on its own lands is a substantial interference with tribal governmental prerogatives. Here we deal with a most traditional concern of tribal communities. It is, of course, no ground of objection that a Tribe has copied the white man's ways of husbanding the resource, enacting detailed regulations, and organizing a successful commercial venture. That is what Congress has encouraged at least since 1934. On the contrary, the infringement is all the more severe when, as here, the Tribe itself has taken control of wildlife management, committing much of its energies to the task, and deriving from the program substantial revenues used to provide governmental services.

In sum, New Mexico's attempted regulation falters on the "independent barrier" prohibiting interference with "the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue, supra*, slip op. 4-5; *White Mountain Apache Tribe* v. *Bracker, supra*, 448 U.S. at 142-143. See, also, *Williams* v. *Lee*, 358 U.S. 217 (1959); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971).

C. State Regulation Of Hunting And Fishing On Reservation Tribal Lands Is Pre-Empted By Federally Sanctioned Comprehensive Tribal Regulation

What is more, the State's interference seriously undermines *federal* policy. We have already seen that, as a general matter, Congress has quite pointedly exempted Indian trust lands and their wildlife from State regulation, while, at the same time, confirming tribal authority in that respect. But, in this case, there is much more: very substantial federal investment of money and personnel, provision of an elk herd and a fish hatchery, approval of the tribal ordinances, and continuing assistance and advice. It is no exaggeration to say that the United States has given its full imprimatur to the tribal program. In these circumstances, the tribal regulations properly may be accorded the pre-emptive force of federal law. See *Fisher* v. *District Court*, 424 U.S. 382, 390 (1976); *United States* v. *Mazurie*, *supra*, 419 U.S. at 556-557.

Certainly, the detailed wildlife conservation and management program is "comprehensive" and "pervasive." See *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 148. It is manifest that here, also, "no room remains for state laws imposing additional burdens," and that, even more directly than the taxes held impermissible in recent cases, the superimposition of State regulation "could * * * disturb and disarrange the [federally approved] plan." *Warren Trading Post Co.* v. *Arizona Tax Commission*, *supra*, 380 U.S. at 690, 691; *White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 152; *Central Machinery Co.* v. *Arizona Tax Commission*, *supra*, 448 U.S. at 166; *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*, slip op. 11. Accordingly, State regulation is pre-empted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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v.
Mescalero Apache Tribe

Docketed:
August 25, 1982

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Dunigan, Thomas L.

Counsel for respondent: Solicitor General, Fettinger, George E., Seneca Jr., Martin E.

Entry	Date	Note	Proceedings and Orders
1	Jun 25 1982		Application for extension of time to file petition and order granting same until August 25, 1982 (White, June 25, 1982).
2	Aug 25 1982	G	Petition for writ of certiorari filed.
3	Sep 27 1982		Brief amicus curiae of States of Utah, Arizona, et al. filed.
5	Sep 27 1982		Order extending time to file response to petition until October 14, 1982.
6	Oct 14 1982		Brief of respondent Mescalero Apache Tribe in opposition filed.
7	Oct 20 1982		DISTRIBUTED. November 5, 1982
8	Nov 8 1982		REDISTRIBUTED. November 12, 1982
9	Nov 15 1982		Petition GRANTED.
			**********
11	Dec 15 1982		Order extending time to file brief of petitioner on the merits until January 13, 1983.
12	Jan 12 1983		Brief amicus curiae of States of Utah et al. filed.
14	Jan 13 1983		Brief of petitioner New Mexico filed.
15	Jan 13 1983		Joint appendix filed.
16	Jan 13 1983		Brief amicus curiae of State of Arizona, et al. filed.
17	Jan 25 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
18	Feb 10 1983		Response of petitioners to motion of Solicitor General to participate in oral argument as amicus curiae filed.
19	Feb 16 1983		Brief amicus curiae of United States filed.
21	Feb 15 1983		Order extending time to file brief of respondent on the merits until March 4, 1983.
22	Feb 22 1983		Motion of the Solicitor General for leave to participate in oral GRANTED.
23	Feb 22 1983		Record filed.
24	Feb 22 1983		Certified C. A. proceedings received.
25	Feb 24 1983		Record filed.
26	Mar 7 1983		Brief of respondent Mescalero Apache Tribe filed.
27	Mar 4 1983		Brief amicus curiae of respondents The Uintah and Ouray Tribes filed.
28	Mar 7 1983		Brief amicus curiae of White Mountain Apache Tribe filed.
29	Mar 10 1983		Brief amicus curiae of Ute Indian Tribe filed.
30	Mar 11 1983		CIRCULATED.
31	Mar 24 1983		SET FOR ARGUMENT. Tuesday, April 19, 1983. (1st case) 1 hour
32	Mar 24 1983		CIRCULATED.

No. 82-331-CFX

Entry	Date	Note	Proceedings and Orders
33	Apr 12 1983	X	Reply brief of petitioner New Mexico filed.
34	Apr 19 1983		ARGUED.